SUPREME COURT, U. S.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968

## No. 647

SALLIE M. HADNOTT; REVEREND WILLIAM McKINLEY BRANCH; JACK DRAKE; JOHN HENRY DAVIS; ROBERT P. SCHWENN; THOMAS WRENN; DR. JOHN L. CASHIN, JR.; and THE NATIONAL DEMOCRATIC PARTY OF ALABAMA, a corporation, for themselves jointly and severally, and for all others similarly situated,

*Appellants,*

—v.—

MABEL S. AMOS, as Secretary of the State of Alabama; EDWARD A. GROUBY, as Judge of Probate for Autauga County, Alabama; and all other Judges of Probate of the State of Alabama, jointly and severally, who are similarly situated; ALBERT P. BREWER, as Governor of the State of Alabama; MACDONALD GALLION, as Attorney General of the State of Alabama, and their successors in each office,

*Appellees,*

EDWARD F. MAULDIN, as Chairman of Alabama Citizens for Humphrey-Muskie, for himself and all other persons similarly situated,

*Appellee-Intervenor,*

and,

JAMES DENNIS HERNDON, Judge of Probate of Greene County, Alabama,

*Defendant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
AND IN THE MATTER OF CONTEMPT OF COURT
BY JAMES DENNIS HERNDON.

# APPELLANTS' BRIEF AND APPENDIX

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*Defendant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA
AND IN THE MATTER OF CONTEMPT OF COURT BY JAMES DENNIS HERNDON.

# APPELLANTS' BRIEF

## Opinion Below

The majority and dissenting opinions of the United States District Court for the Middle District of Alabama are not yet reported.[1] They are at pages 539-67 of the Record.

## Jurisdiction

A Temporary Restraining Order was issued by the District Court on September 18, 1968 (R. 237). This order was dissolved on October 11, 1968 (R. 569), following a hearing on the merits held on September 30, 1968 (R. 405-06). Notice of Appeal was filed on the same day (R. 571-72), an application for temporary relief was filed on the following day, the temporary relief was ordered restored by this Court on October 14, 1968, oral argument was had here on October 18, 1968, and the order continuing the temporary relief herein was entered on October 19, 1968. Probable jurisdiction was noted by order entered December 16, 1968, calling for appellants' brief to be filed by January 3, 1969.

Jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C. § 1253. The following decisions sustain jurisdiction: *Florida Lime and Avocado Growers Inc.* v. *Jacobsen,* 362 U. S. 73 (1960); *Sterling* v. *Constantin,* 287 U. S. 378 (1932).

On November 15, 1968, appellants transmitted to this court their Motion for Order to Show Cause as to Why

[1] The opinion of the District Court on an ancillary matter (a motion to quash subpoena for taking of the deposition of the Governor) is reported at 291 F. Supp. 309.

James Dennis Herndon, Judge of Probate, Greene County, Alabama, Should Not Be Held in Contempt of This Court and to Set Aside the Results of the Election in Said County and Cause New Elections to Be Held Therein.[2] The order noting probable jurisdiction set this motion for hearing together with the appeal.

This Court has inherent power to hear and try defendant Herndon for the allegedly contemptuous violation of its orders of October 14 and 19, 1968. Statutory jurisdiction therefor is conferred by 18 U. S. C. § 401(3), and 28 U. S. C. § 1651(a). The following decisions sustain this jurisdiction: *United States* v. *Shipp*, 203 U. S. 563, 573 (1906); *Merrimack River Savings Bank* v. *City of Clay Center*, 219 U. S. 527, 536 (1911).

## Constitutional Provisions and Statutes Involved

This action involves article I, sections 2 and 3, article II, section 1, as amended by the twelfth amendment, and the first, ninth, fourteenth, fifteenth and seventeenth amendments of the Constitution of the United States. Additionally involved are interpretations of Sections 2, 4(a) and (c), and 5 of the Voting Rights Act of 1965, 42 U. S. C. §§ 1973, 1973b(a) and (c), and 1973c; 18 U. S. C. § 401(3); and 28 U. S. C. § 1651(a).

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[2] Thereafter, on November 20, 1968, the United States filed a series of motions in this case in the United States District Court for the Middle District of Alabama seeking relief in several respects similar to that sought by appellants' motion. These pleadings are described in the Memorandum for the United States filed herein dated November 1968; the district court's orders on these motions are included as an appendix to that Memorandum. Appellants' response to the Memorandum was transmitted to this Court on November 27, 1968. On December 20, 1968, the District Court enjoined the opponents of the NDPA local candidates in Greene County, Alabama, from assuming office.

The facial or applicatory constitutionality or illegality of the following provisions of Alabama law are also involved: Title 17, §§ 125, 145(3) (the "Garrett Law"), 148, and 274-75, Code of Alabama (Recomp. 1958).

The applicable portions of each constitutional and statutory provision are set out in the Appendix at pp. 1a-13a.

## Questions Presented

1. Whether the Garrett Law (Title 17, § 145(3) Code of Alabama (Recomp. 1958)) is unconstitutional on its face and in its application or is in violation of Section 5 of the Voting Rights Act of 1965, 42 U. S. C. § 1973c, in the following respects:

a. Its requirement that a candidate file a notice of intention eight months prior to the general election is arbitrary, capricious and unreasonable and in violation of the due process and equal protection clauses of the fourteenth amendment.

b. It invidiously discriminates against minority political parties and their members in violation of the equal protection clause of the fourteenth amendment.

c. It was racially motivated, or alternatively has a racially exclusive effect, is invidiously discriminatory, and perpetuates white-only political office retention in the state of Alabama in violation of the first, ninth, fourteenth and fifteenth amendments of the Constitution of the United States.

d. Its effect is unjustifiably to prevent plaintiffs from seeking elective office and effectively to disenfranchise plaintiffs and the class they represent in violation of article

I, sections 2 and 3, article II, section 1 (as amended by the twelfth amendment), the first, ninth, fourteenth, fifteenth, and seventeenth amendments of the Constitution of the United States.

e. It was enacted in 1967, erecting a voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964, but it has been neither the subject of an action for a declaratory judgment nor has it been submitted to the Attorney General of the United States for approval (Alabama being a state with respect to which determinations have been made under section 4(b) of the Voting Rights Act of 1965, 42 U. S. C. § 1973b).

2. Whether Title 17, §§ 274-75, Code of Alabama (Recomp. 1958) are unconstitutional on their face and in their application, said sections not having been relied upon by defendants prior to the filing of this suit, but having been invoked against all NDPA nominees, regardless of their compliance therewith, after suit was brought, in the following respects:

a. They are unconstitutionally vague and overbroad and consequently facially violative of the first amendment, and the due process clauses of the fifth and fourteenth amendments, they being essentially penal statutes (*id.* §§ 276 and 332).

b. They have been unequally and unconstitutionally applied to the plaintiffs herein in violation of article I, sections 2 and 3, article II, section 1 (as amended by the twelfth amendment) and the first, fifth, fifteenth, and seventeenth amendments and the due process clause and equal

protection clause of the fourteenth amendment of the Constitution of the United States.

c. There is no reasonable relationship between the evil which the statutes were intended to correct and the time requirements or the penalty (removal from the ballot), said provisions thereby being arbitrary and capricious and effecting a deprivation of the right to vote, all in violation of the first amendment, the due process clauses of the fifth and fourteenth amendments, the equal protection clause of the latter amendment, the fifteenth and seventeenth amendments, and article I, sections 2 and 3, and article II, section 1 (as amended by the twelfth amendment) of the Constitution of the United States.

d. Section 274, *id.*, constitutes a test or device prohibited by sections 4 and 11(a) of the Voting Rights Act of 1965, 42 U. S. C. §§ 1973b and i(a).

3. Whether the refusal of the appellees to place the names of NDPA nominees on the ballot deprived plaintiffs and the class they represent of the right to vote a straight ticket (a right otherwise guaranteed them by the law of Alabama, Title 17, §§ 97, 157, Code of Alabama (Recomp. 1958), and assured those who desire to vote a straight ticket for the nominees of Alabama's Democratic and Republican Parties), in that said action, particularly when coupled with the placing of the American Independent Party ("AIP") Presidential Elector nominees on the Alabama Democratic Party column rather than on that of the AIP and the placing of the names of Presidential Elector candidates pledged to the national Democratic Party Presidential candidates on a separate column (candidates for no other offices appearing thereon), deprived

plaintiffs and the class they represent, many of whom are illiterate or inexperienced voters, of the equal right to vote in violation of the due process and equal protection clauses of the fourteenth amendment, the fifteenth and seventeenth amendments, article I, sections 2 and 3, article II, section 1 (as amended by the twelfth amendment) and the first and ninth amendments, all of the Constitution of the United States, and 42 U. S. C. §§ 1981, 1983, the Voting Rights Act of 1965, and 42 U. S. C. §§ 1971-73p, more particularly, sections 2, 4, and 11(a) thereof, 42 U. S. C. §§ 1973, 1973(b), 1973i(a), creating a "test or device" prohibited thereby.

4. Whether Title 17, § 148, Code of Alabama (Recomp. 1958) (prohibiting appearances of the same names on the ballot more than once or under more than one party emblem) is facially unconstitutional and unconstitutional in its application to plaintiffs in that it violates article I, sections 2 and 3, article II, section 1 (as amended by the twelfth amendment), the first, ninth, the due process and equal protection clauses of the fourteenth amendment, the fifteenth and seventeenth amendments, all of the Constitution of the United States, and the Voting Rights Act of 1965, 42 U. S. C. §§ 1971-73p; there being an unequal application of the statute and, additionally, agreement by plaintiffs to run for Presidential Elector on their own column those Presidential Elector candidates pledged to support the nominees of the national Democratic Party who then appeared as candidates on a separate ticket (no candidates for other office appearing thereon), said agreement to apply if the votes in both columns be cumulatively totaled.

5. Whether Title 17, § 125, Code of Alabama (Recomp. 1958) which in effect provides that election officials will

be chosen solely by the two established major parties, is facially unconstitutional and unconstitutional in its application to plaintiffs (particularly when, as here, there were more than two parties on the ballot) in that it violates article I, sections 2 and 3, article II, section 1 (as amended by the twelfth amendment), the first, ninth, the due process and equal protection clauses of the fourteenth amendment, the fifteenth and seventeenth amendments, all of the Constitution of the United States and the Voting Rights Act of 1965, 42 U. S. C. §§ 1971-73p.

6. Whether the appellees deprived plaintiffs and the Negro and other voters of Alabama of the equal right to vote for candidates of their own choosing and to have those votes counted in violation of the due process and equal protection clauses of the fourteenth amendment, the right freely to express themselves as guaranteed by the first amendment, the right to vote and run for political office regardless of race as guaranteed by the fourteenth and fifteenth amendments and the rights retained by the people as guaranteed by the ninth amendment, all of the Constitution of the United States. The action complained of was the refusal to place the nominees of NDPA on the ballot for the November 5, 1968 general election despite their substantial compliance with the state's election laws.

7. Whether defendant James Dennis Herndon should be held in civil or criminal contempt, or both, for violation of this Court's orders of October 14 and 19, 1968, by his failure or refusal to place the names of NDPA candidates upon the ballot in Greene County, Alabama, and, if found guilty of civil contempt or criminal contempt or both the remedy or punishment to be ordered therefor.

## Statement of the Case

### a. *The Prelude.*

Beginning in late 1967 appellants[3] organized and incorporated the National Democratic Party of Alabama ("NDPA"), a racially integrated political party (Cashin[4] 209-19), which was accepted by the defendant Secretary of State as a political party, and allowed the use of a party emblem. NDPA proceeded to nominate candidates for local and state office at mass meetings on May 7, 1968, in accordance with Title 17, §§ 413-16, Code of Alabama (Recomp. 1958) (*E.g.*,[5] R. 181-86). A state convention of NDPA delegates selected at the mass meetings was held in Birmingham, Alabama, on July 20, 1968, and candidates for state and national office were selected (*E.g.*, R. 149-52).

On August 14, 1968, following the preparation and filing with her of papers by Alabama Democratic Party officials, the defendant Secretary of State, herself a Presidential Elector nominee pledged to support, if elected, the can-

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[3] Appellants were plaintiffs in the court below and will be referred to herein as plaintiffs; appellees were defendants below and will be referred to herein as defendants. Defendant James Dennis Herndon will be referred to by name where the subject matter particularly relates to him.

[4] Nineteen depositions were taken in the case in chief and were all admitted into evidence at R. 403; they are certified as exhibits and thus are not paginated into the Record; since the November 5, 1968 general election, 16 additional depositions have been taken in the District Court and a motion is being filed there to cause their transmission to this Court; therefore all depositions will be cited by the surname of the deponent and the page of or exhibit to that deposition.

[5] Many statements herein are supported numerous times in the Record, thus exemplary citations will sometimes be used.

didacy of George C. Wallace for the Presidency (Brewer 9), stated that unless the NDPA chairman proved the Huntsville mass meeting was held she would cause the exclusion of the NDPA and its nominees from the general election ballot (R. 179).

Later she publicly indicated that she had changed her mind and intended to certify the party and its nominees if they filed certificates of nomination with her by September 5, 1968 (R. 177-78). On September 5, 1968, the NDPA certificates were filed, she stating that the papers were in order (Cashin 203).

Thereafter, on September 10, 1968, the Secretary of State issued a public statement of her intention to certify only two NDPA nominees as candidates (*Id.* 204).

**b. *This Case in the Court Below.***

On September 13, 1968, this action was filed; plaintiffs seeking declaratory and injunctive relief to place the names of nominees of the NDPA on the ballot for the November 5, 1968 general election. Additionally, they sought to enjoin on the grounds of facial and applicatory unconstitutionality the enforcement of certain Alabama election laws.

A statutory three-judge district court was convened on September 16, a hearing was held (R. 360), and a Temporary Restraining Order granting plaintiffs relief was issued on September 19 (R. 237). On September 30, a hearing was held on preliminary and permanent relief (R. 388). Thereafter, on October 11, 1968, the District Court filed its opinion, Judge Frank M. Johnson dissenting. The District Court decided that substantial federal constitutional questions had been raised and that the Secretary of State and

the defendant Judges of Probate by relying upon the alleged non-holding of the Huntsville mass meeting as grounds for the denying of certification had violated the fourteenth amendment, but held the questioned Alabama statutes constitutional on their face and in their application. Plaintiffs immediately filed their notice of appeal.

**c. *Additional Facts.***

The Secretary of State had denied that the evidence for the NDPA mass meeting, alone among the various parties, was adequate, and had only one other ground for refusing registration—that some NDPA candidates had failed to file declarations of intention of candidacy on March 1, 1968 (250 days prior to the November 5, 1968, general election), as required by the Garrett Law (Amos 5). Thus, only one of the two original grounds for the denial of certification remains; and that involves the constitutionality or legality of the Garrett Law.

At the September 16, 1968, hearing on Motion for Temporary Restraining Order the District Court ordered counsel to certify to the court before 9:00 a.m. September 18, 1968, "the names of persons or the names of such of your groups of candidates as are not qualified on grounds other than those raised in this lawsuit" (R. 379). Counsel for defendants were directed regarding any such other grounds "to furnish [by letter] that information to Mr. Morgan with a copy to this Court" (R. 384).

On the afternoon of September 17, 1968, counsel for defendants furnished their letter which stated, in part:

> In addition, under the case of *Herndon* v. *Lee,* 199 So. 2d 74 (Ala.), a candidate must comply with Section 274, Title 17, Code of Alabama 1940, Recompiled 1958,

within 5 days after certificates of the mass meetings of May 7, 1968, were filed in the Probate Offices and with the Secretary of State. No such compliance or designation or statements were filed as required by said Section 274; hence all of said candidates designated on plaintiffs' schedule under the *Herndon* case are ineligible to have their names placed upon the ballot or ballots for the November election. Section 275, Title 17, Code of Alabama 1940, Recompiled 1958 (R. 234).

Thus, by the state's own interpretation of sections 274-75, *supra,* the last day for filing the designations or statements required was midnight, September 10, 1968.[6] During that day the Secretary of State publicly announced that NDPA nominees would not be certified as candidates.

Thus, the sole second remaining and latest ground for deprivation of the right to run for public office and the equal right to vote was:

(a) " . . . invoked strictly as an afterthought"[7] after NDPA nominees were forced to file suit to become even potential candidates; and

(b) after the Secretary of State publicly announced *during the five day statutory period* provided by sec-

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[6] "The evidence as to the Secretary of State is that filing dates are carefully watched and late filings not accepted." Majority opinion (R. 547). At no place in the opinion, the statute, or the record is the proper date for filing set forth. Herndon v. Lee, 281 Ala. 61, 199 So. 2d 74 (1967), and this letter firmly establish September 5, 1968, as the date on which the five day filing period must normally begin to run.

[7] Johnson, *J.*, dissenting (R. 563).

tion 274, *supra*, that they were not to be allowed to be candidates; and

(c) even though immediately after the Temporary Restraining Order allowing plaintiffs to be candidates was entered (by September 20, 1968) the Statement was filed by counsel with every Judge of Probate of Alabama and with the Secretary of State (R. 246).

As a matter of fact, however, at least 30 of the nominees had filed the required statement for their office as a part of their Garrett Law declaration of intent and at least six others filed such a statement as part of a declaration for a different office of different numbered Presidential Elector place (R. 97-133). Nevertheless the state persisted, as shown by its letter and answer, in attempting to disqualify "each and every one" of the NDPA nominees (R. 278).

On these two grounds—that not all of them told the state they intended to run for office 250 days before the election and that some of them told the state they were designating themselves as the persons to receive campaign contributions, at most, nine days too late—89 candidates (R. 262-64) for public office, most of them Negro candidates for local office, were to be denied or have seriously jeopardized, their right to participate in the general election.[8]

### d. *The Secretary of State and the Unequal Application of the Law to Negro and Non-Experienced Voters.*

Defendant Mabel Amos, Secretary of State, received and did not respond to the following letter:

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[8] In the case of local offices the determination of who goes on the ballot is made by the county Judge of Probate, Title 17, §145, Code of Alabama (Recomp. 1958). The Secretary of State and all Judges of Probate are white and all but one of them are members of the Wallace-dominated Alabama Democratic Party.

3-25-68

Hi Mabel—

Enclosed are the 150 party emblems—per your request. Please send the 150 back to me (the ones which had the motto marked out).

Congratulations on your diligent efforts, which resulted in the disqualification of some liberals.

Regards

Bill Mori
[Chairman of the Alabama Conservative Party]
(Amos Pl. Exh. J)

Defendant Amos' predecessor had assisted the Alabama Conservative Party in its formation[9] (Amos 37-39), and Mrs. Amos had not questioned the Conservatives' certifying that they had held their statutory mass meeting at a motel (Amos Pl. Exh. H) rather than "in the immediate vicinity of the voting place . . . " as required by Title 17, § 414, Code of Alabama (Recomp. 1958).

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[9] This is not entirely consistent with the district court's rationale, for, as the majority said in upholding the application of the Garrett Law:

> Those political groups in Alabama more formally and more permanently organized and familiar with election procedures will find compliance with the statement of intent law easier than those who are not. But this difference alone presents no constitutional infirmity. The same problem will exist with regard to any requirements of the election laws regardless of the details of the electoral machinery provided by the state (R. 556).

Further inequalities were:

(1) The American Independent Party of Alabama was placed on the ballot even though it filed a certificate which failed to set forth the date of holding of a "mass meeting." The technique?—defendant Amos simply accepted a new certificate and the Party dismissed its lawsuit. See *Turner* v. *Amos*, C. A. No. 2756-N (M. D. Ala., Sept. 16, 1968).

(2) The Prohibition Party filed the names of more candidates for elector than Alabama had electoral votes and failed to number the places for which its nominees were offered. They were allowed a place on the ballot, defendant Amos advising them into compliance with her requirements (Amos 77-80).

(3) The district court said:

> The information [upon which Mrs. Amos denied certification to the entire slate of NDPA] consisted of a letter from two residents of Huntsville who had no personal knowledge of whether the mass meeting was held, accompanied by affidavits of two persons containing "evidence" of the most slender nature, largely circumstantial and in part hearsay,[10] attempting to negative the certification that the meeting had been held (R. 559).

Her action thereon "was a violation of basic principles of equal protection, due process and essential fairness" (R. 560).

This "evidence" was received by Mrs. Amos on Wednesday, August 14, 1968 (Amos Pl. Exh. A), five days before the Committee on Credentials of the 1968 Democratic National Convention convened. She denied she knew her pub-

[10] The only affiant in the vicinity was blind (Marlow *passim*).

lic prediction that she would deny certification would be used against NDPA which was mounting a well publicized challenge in opposition to the ADP and AIDP delegations. She protested political innocence[11] (Amos 108). Yet, as particularly shown by the ADP brief before the credentials committee, her public prediction was used, and used effectively (Cashin 229-32A).

(4) As noted by Judge Johnson, dissenting:

> The best of laws [Title 17, §§ 274-275, Code of Ala. (Recomp. 1958) The Corrupt Practices Law], however, can be invoked in an unworthy manner. Here, it was invoked strictly as an afterthought. As the majority concedes:
>
> > "When the Secretary of State declined to certify to the Judges of Probate NDPA candidates who filed nominations in her office, she did not assert failure to comply with the Act as one of her motivations. Her motivation is irrelevant to a judicial determination of whether the Act is constitutional *on its face.*" (Emphasis added.)
>
> The Corrupt Practices Act has not fallen into disuse. Nor, as the cases cited by the majority indicate, has the remedy of disqualification. In all those cases, however, the Act was invoked by opposing candidates or by concerned voters. Alabama state officials having

[11] Regarding her political acumen, the Governor said:

> A. Oh, yes, Mrs. Mabel has been a public servant for many years, even before I knew her, continuously during this period of time. She had handled, during this period of time matters that are politically quite sensitive, almost as a daily occurrence in her official duties.
>
> I don't think anyone questions her integrity or her ability to deal quite fairly with any situation (Brewer 18).

She has worked in the offices of six Alabama governors (Amos 109).

adopted a consistent practice of relying on party and public policing and enforcement of this Act, it is not tolerable for this Court to allow these officials to make their first foray in the enforcement direction against a small, new, and almost surely impecunious group of candidates seeking to form a new party in Alabama. This is particularly true when the defendant officials who are taking such action are candidates for Presidential electors on the ballot of an opposing party. Whether or not a formal conflict of interest, this circumstance, when conjoined with those above, justified the inference that the Corrupt Practices Act, fair on its face, has been:

> "applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances . . . ." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373-74 (1886).

In this vital area of the right to vote and to run for office, the courts must not hesitate to exercise their judicial duty to ensure an evenhanded application of the Alabama election laws (R. 563-64).

(5) No more clear proof of unequal protection in the application of the Corrupt Practices Act could appear than is found in the post-election evidence compiled regarding the action of the defendant Herndon. There the Negro candidates filed all documents filed by the white candidates and then some (Herndon 59-60). See also Appendix to the brief of the United States, *amicus curiae*, filed herein.

Despite this their names were not placed on the ballot.[12]

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[12] The acts of defendant Herndon are fully explored, *infra*, pp. 59-85.

**c. *The Role of AIDP.***

The formal organization of NDPA was delayed when, in December, 1967, it was learned that the Alabama Independent Democratic Party ("AIDP") had been incorporated (Cashin 213). Considerable discussion, among those interested in forming NDPA and with AIDP people, ensued (*id.* 214)[13]; it appeared that AIDP might be an appropriate or helpful vehicle for advancing the twin goals of NDPA—insuring for once an opportunity for Alabamians to vote for the Democratic Presidential nominee[14] (R. 71), and providing a means for political participation by Alabama citizens in liberal politics on an integrated, non-separatist basis, without regard to the politics of race.[15] At a meeting on December 30, 1967, the chairman of AIDP and the regular Alabama Democratic Party ("ADP"), (which until 1966 had the words "White Supremacy" on its official ballot emblem) jointly explained the

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[13] Negotiations have continued almost to this day—at R. 356 is a stipulation between counsel for plaintiffs and the AIDP chairman to the effect that, if the prohibition of Title 17, Section 148, Code of Alabama (Recomp. 1958) against multiple appearances of names on the ballot could be avoided, both parties would consent to the listing of AIDP Presidential Elector nominees in the NDPA column as well, and the NDPA Elector nominees would be withdrawn (both slates are pledged to the Humphrey-Muskie ticket).

[14] This opportunity was not available in Alabama in four of the last six Presidential elections.

[15] It is judicially known to the federal courts of Alabama and the Fifth Circuit that race and politics have been inseparable there. See, *e.g.*, Smith v. Paris, 257 F. Supp. 901, 904 (M. D. Ala. 1966), modified and aff'd, 386 F. 2d 979 (5th Cir. 1967). The state's political structure is substantially all white (Cashin 216-17). Defendants illustrate the habit of racial thinking by attaching to their answer affidavits of a Judge of Probate, Mayor, and Town Clerk referring to an NDPA candidate as "one J. H. Davis, Negro" (R. 292, 293, 327). *Cf.* Anderson v. Martin, 375 U. S. 399, 404 (1964).

device whereby ADP delegates could show compliance with the anti-discrimination mandate of the Democratic Party nationally, thereby assuring its delegates of seats at the Democratic National Convention (Cashin 215). This plan involved AIDP's running a separate slate of elector nominees pledged to the national Presidential ticket, but running no other candidates for any office. To insure this the AIDP Articles of Incorporation stated:

> The corporation shall not have the power to nominate any candidate for national, local or state public office, except presidential election.
>
> * * * * *
>
> The party shall have no members (R. 79).

ADP electors, inevitably to be pledged to George C. Wallace, and ADP candidates for other national, state and local offices would run on a single ballot column (Cashin 215-19). As said at this meeting, this would "protect" the "some 2000 Democratic offices located throughout the State and they want to protect those, and they want George Wallace electors to carry that . . ." (*Id.* 217; see *Id.* 232A for the explanation of this by ADP at the Democratic National Convention).

Although AIDP is forbidden to have members or nominate candidates for office except Presidential Elector no experienced politician who testified had ever heard of a "political party" so limited (*E.g.* Amos 89, Grouby 9). NDPA, on the other hand, has a substantial membership including a large number of Negroes and politically inexperienced, sometimes illiterate, voters (Cashin 180-81; see, *e.g.* Walbert *passim*); it adopted a platform (R. 153-62),

an almost unheard of species of document in Alabama state politics. Yet AIDP nominees for Presidential Elector were certified[16] (Amos 91); NDPA nominees were not.

*f. The November 5, 1968 General Election Ballot.*

It was contended below that the form of ballot sought by defendants would effectively deprive plaintiffs and thousands of Negro citizens of their right to vote and that ballot is on its face a prohibited "test or device" calling for a degree of understanding not possessed by many literate let alone illiterate voters. See the sample ballot, Exhibit G to Amos. If defendants are successful: (a) Those who desire to vote for the candidates of the Alabama Republican Party need simply pull one lever or mark one ("x") to do so. (b) Those who desire to vote for the candidates of the ADP need simply pull one lever or mark one ("x") to do so.[17] (c) Those who desire to vote for the national nominees of the Democratic Party will pull one lever or mark one ("x") to do so and then move across the seven columns on the face of the ballot attempting to select candidates for local, state and national office. Without NDPA they will find few, if any, Negro or white liberal candidates there.

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[16] Although, as defendant Amos put it, "This is a splinter party, this is not a party, as I understand. It is a party within a party" (Amos 89).

[17] And thereby cast their ballots for George C. Wallace, a nominee for President on a third party slate in states other than Alabama. Plaintiffs and the class they represent did not desire to do this. Nor did they desire to be limited in their choices with regard to other state and local officials. For example, they had neither a desire to vote for ADP nominee Eugene "Bull" Connor for President of the Public Service Commission nor for his Alabama Republican Party opponent.

Only plaintiffs complain of this discrimination between voters, which, in effect, serves as a scheme or device to lock voters previously excluded therefrom into the ADP and will inevitably deprive some voters of the right to cast ballots for candidates of their own choosing.

That the right to vote a straight ticket is essential to the less than literate voter seems clear. He either has that right or: (1) He must wander across a complicated ballot, or (2) seek help in casting his vote.[18]

Ironically, straight ticket voting appears to be guaranteed by Alabama law. Title 17, Sections 97, 157, Code of Alabama (Recomp. 1958).

## Summary of Argument

Plaintiffs contend that the existence or unequal application of certain Alabama statutes denies them the various rights guaranteed them by the Constitution of the United States and the Voting Rights Act of 1965, 42 U. S. C. §§ 1971-73p, *i.e.*, the assurance to them as citizens, and more particularly as newly enfranchised Negro citizens, of full and meaningful participation in the political process. The foundation of these rights is the fifteenth amendment, the fourteenth amendment, particularly the equal protection clause, and the preeminent position of political expression

[18] An Alabama Judge of Probate, a veteran politician recognized the value to any party, including NDPA, of straight ticket voting (Grouby 29), and that both illiterate and literate voters may have to

> "ask the election official, tell him what party he wants to vote for. If he wants to vote for the National Democratic Party, or the Democratic Party of Alabama, whichever one he is voting for, and the two of them will go in the booth with him and show him which label he wants to vote on" (Grouby 30).

under the first amendment. The passage of the Voting Rights Act of 1965 resulted in the first real and effective twentieth century enfranchisement of large numbers of potential Negro voters and candidates. The Act, if strongly implemented, will remove what, considering the centrality of the vote to democracy, must have been an even more onerous badge of slavery than the segregation of Negroes into ghettoes so forcefully condemned in *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968). Particular facets of the argument may be summarized as follows:

The Garrett Law, requiring a declaration of intention some 250 days before the election, is too heavy a "burden . . . on the right to vote and to associate." *Williams* v. *Rhodes*, 89 S. Ct. 5, 11 (1968). In the *Williams* case a similar aspect of the Ohio election laws was most explicitly dealt with in the district court's opinion, this court affirming the declaration of unconstitutionality. Analogy to the reasoning of *Harman* v. *Forsennius*, 380 U.S. 528 (1965) is particularly apt. And when considered with the other statutes at issue herein, its application to Alabama Negro voters newly emerging into political prominence under the Voting Rights Act must fall as the Ohio laws did in *Williams*.

As distinct ground for the invalidity of the Garrett Law, it has not been submitted to the Attorney General as required by the Voting Rights Act of 1965 § 5, 42 U. S. C. § 1973c. It is just as much an abridgment of the right to vote to deprive the voter of candidates as it is to deprive him of the right to enter the voting booth.

After the filing of this suit, and apparently as an afterthought, the State invoked a blunderbuss application of its

Corrupt Practices Act (the Alabama courts have said that the use of the word "corrupt" is something of a misnomer, *Jones* v. *Phillips*, 278 Ala. 354, 185 So. 2d 378, 381 (1966)). Under the facts of this case, plaintiffs contend that they did actually comply with the Act, and there is little doubt that they complied with its purpose, any failure of literal compliance amounting to no more than a few days and resulting in no prejudice to anyone.

The state is estopped to rely on the challenged sections, Title 17 §§ 274-75 Code of Alabama (Recomp. 1958) because the Secretary of State's action in refusing to certify the nominees (which action must have served as precedent for the Probate Judges) tolled the running of the statute and additionally rendered filing of the required statement an apparent futility. There is authority in various fields of law to the effect that performance of a futile act which on its face may appear to be a prerequisite is not required. See, *e.g.*, 1 K. C. Davis, *Administrative Law Treatise* § 2.04 (1958); 3 *id.* § 20.01.

It is strongly indicated that this Act is applied with much more particularity to Negro candidates, including plaintiffs, than to white candidates. It is impossible to compile a precise history on this particular point since, prior to two years ago, Negroes did not run for office in Alabama (the reasons for this fact having relevance to the situation). Additionally it is contended that the statutory scheme, disqualifying as it does the candidates for trivial oversight, is in violation of the fourteenth amendment as not providing the least drastic alternative to a legitimate state end and, taken as a whole, particularly where the disenfranchisement is wholesale, is a test or device prohibited by the Voting Rights Act of 1965 § 4, 42 U. S. C. § 1973b.

The prohibition in Title 17, § 148 Code of Alabama (Recomp. 1958) against the appearance of candidates more than once on the ballot deprives plaintiffs of equal protection of the laws in that it is arbitrary and irrational, particularly in juxtaposition with rights of the magnitude here involved. Further it has the effect, albeit unintended, of in this case making the exercise of the franchise so difficult as to constitute a test or device prohibited by the Voting Rights Act and a denial of equal protection. The effect of this section is to deprive plaintiffs of the benefits of straight-ticket voting (a right guaranteed to other political parties in Alabama), and at the same time unduly to complicate the ballot.

Title 17, § 125 Code of Alabama (Recomp. 1958) is on its face a blatant violation of equal protection in that it limits the selection of persons to be placed in positions of discretion and authority over the conduct of the election to those chosen by the two major political parties. Major party domination of the electoral process is condemned in *Williams* v. *Rhodes, supra.*

After this Court's orders of October 14 and 19, 1968, James Dennis Herndon, Judge of Probate of Greene County, Alabama failed to cause the NDPA nominees to appear on the ballot exercising a contempt of this Court. The proof will show that he has no substantial defense; the Court's authority to punish in proceedings such as this is clear. *United States* v. *Shipp,* 203 U. S. 563 (1906), 214 U. S. 386 (1909), 215 U. S. 580 (1909). In addition his failure to place the nominees on the ballot amounted to a destruction of the subject matter of litigation pending an appeal, action condemned by *Merrimack River Savings Bank* v. *City of Clay Center,* 219 U. S. 527 (1911).

# ARGUMENT

## I.

## The Case in Chief.

### A. *The Racial Background of Alabama Politics and the NDPA.*

In only one election since 1944 have those Alabama voters who desire to cast a full and meaningful vote for the Democratic Presidential nominee been able to do so.[19]

The political structure of no other American state has so successfully deprived voters of their right to vote.

In 1968 while a former Governor of Alabama sought a place on the Ohio ballot for himself, Alabama Presidential Elector candidates pledged to his support attempted to deny NDPA and its candidates a place on the ballot.[20]

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[19] " . . . but it has never seemed to be a difficult matter to obtain ballot position in Alabama," says defendant Brewer (Brewer 21-22).

[20] Alabama election practices, in their racial context, have been before this Court and the lower United States courts many times. Moody v. Flowers, 387 U. S. 97 (1967); Reynolds v. Sims, 377 U. S. 533 (1964); Alabama v. United States, 371 U. S. 37 (1962); Gomillion v. Lightfoot, 364 U. S. 339 (1960); Smith v. Paris, 386 F. 2d 979 (5th Cir. 1967); Gilmore v. Greene County Democratic Executive Comm., 368 F. 2d 328 and 370 F. 2d 919 (5th Cir. 1966); Dent v. Duncan, 360 F. 2d 33 (5th Cir. 1966); United States v. Bruce, 353 F. 2d 474 (5th Cir. 1965); United States v. Scarborough, 348 F. 2d 168 (5th Cir. 1965); United States v. Logue, 344 F. 2d 290 (5th Cir. 1965); United States v. Mayton, 335 F. 2d 153 (5th Cir. 1964); United States v. Atkins, 232 F. 2d 733 (5th Cir. 1963); Kennedy v. Bruce, 298 F. 2d 860 (5th Cir. 1962); Alabama *ex rel.* Gallion v. Rogers, 285 F. 2d 430 (5th Cir. 1961), *cert. denied*, 366 U. S. 913 (1961); Gray v. Main, Civ. No. 2430-N (M. D. Ala., filed July 5, 1966); United States v. Executive Comm. of the Demo-

Thus this case arises from the first state-wide attempt of Negro and white voters to wend their way through the tortuous maze of Alabama's election laws. NDPA members are mostly people who have never been a part of the political process, people to whom the political structure had traditionally been hostile. See, *e.g.*, United States Commission on Civil Rights, *Political Participation* (1968) (herein cited as *Political Participation*).

Ideally, to avoid conflict with the inevitably strict state construction of Alabama's election laws, the following should have been accomplished before March 1, 1968, (the date by which declarations of intention to run for office are required by the Garrett Law):

1. The organization of the state and every county and congressional district, with sufficient publicity to reach

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cratic Party of Greene County, 254 F. Supp. 543 (N. D. Ala. 1966) (the other named defendants were the Democratic Executive Committees of Sumter and Marengo Counties and the Judges of Probate of all three counties, including defendant James Dennis Herndon); United States v. Executive Comm. of the Democratic Party of Dallas County, 254 F. Supp. 537 (S. D. Ala. 1966); Sellers v. Trussell, 253 F. Supp. 915 (M. D. Ala. 1966), *appeal dismissed*, 385 U. S. 19 (1966); United States v. Clark, 249 F. Supp. 720 (S. D. Ala. 1965); Reynolds v. Katzenbach, 248 F. Supp. 593 (S. D. Ala. 1965); Simms v. Baggett, 247 F. Supp. 96 (M. D. Ala. 1965); Williams v. Wallace, 240 F. Supp. 511 (M. D. Ala. 1965); United States v. Parker, 236 F. Supp. 511 (M. D. Ala. 1964); United States v. Cartwright, 230 F. Supp. 873 (M. D. Ala. 1964); United States v. Penton, 212 F. Supp. 193 (M. D. Ala. 1962); Sellers v. Wilson, 123 F. Supp. 917 (M. D. Ala. 1954); United States v. Strong, 10 RACE REL. L. REP. 710 (1965); United States v. Hines, 9 RACE REL. L. REP. 1332 (1964); United States v. Ford, 9 RACE REL. L. REP. 1330 (1964); United States v. Alabama, 7 RACE REL. L. REP. 1146 (1962); Gomillion v. Rutherford, 6 RACE REL. L. REP. 241 (1961); *In re* Gallion, 6 RACE REL. L. REP. 185 (1961); *In re* George C. Wallace, 4 RACE REL. L. REP. 97 (1959).

every person who might desire to be or be willing to become a potential candidate on the party's ticket;[21]

2. The obtaining of information about which offices would be filled in the November general election;

3. The obtaining of information about the qualifications for each such office and whether they are filled by election at large or from districts and whether the candidate must live in the district, ascertainment of the boundaries of the districts or beats or precincts represented by such offices (including intra-county districts, generally established by local acts);[22]

4. The dissemination of information about the foregoing;

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[21] The majority opinion below does not consider that some potential candidates do not "run" for nomination. Were the Garrett Act constitutional and applicable on a national level no major party candidate for the Vice-Presidency would have been eligible to serve in decades. Neither Messrs. Agnew nor Muskie nor LeMay, were declared candidates for the Vice-Presidency, for example. Additionally, in 1952 neither Gov. Stevenson nor President Eisenhower would have been eligible for nomination or election.

[22] On discovery the defendant Grouby, Judge of Probate of Autauga County, testified that district boundaries were set by local act, he and other local politicians knew them because they have been in politics all their lives, but about the only way a neophyte would find them out is to ask a politician, *e.g.*, a prospective opponent (Grouby 18-21). Judge Meeks, Judge of Probate of Jefferson County, testified that no definitive conclusion has been reached as to the proper interpretation of the statute setting up the places for election to the Jefferson County Board of Education (Meeks 15-16, 33). And see POLITICAL PARTICIPATION, ch. 2 "Preventing Negroes from Becoming Candidates or Obtaining Office," subchapter entitled "Withholding Information" 48 (An Alabama Judge of Probate refused to give civil rights workers advice on election laws on the grounds he, the Judge, was not a lawyer).

5. The obtaining of decisions from prospective candidates (and non-candidates willing to run) that they would, in fact, run; a decision by persons to be later nominated ("drafted" perhaps without their knowledge) more than two months later, an obvious impossibility and, in some sections of Alabama at least, a decision which if publicized may involve some personal risk;

6. The preparation, signing, finding of a notary public for acknowledgment (in some Alabama counties not too easy a task for Negroes), and filing of a paper by each prospective candidate.

Compare the Ohio district court majority's application of the doctrine of laches to a seventy-six-year-old political party and a one-man candidacy—"George C. Wallace has been a potential candidate for President of the United States for several years." *Socialist Labor Party* v. *Rhodes*, 290 F. Supp. 983, 991 (S. D. Ohio) (three-judge court), *modified and aff'd sub nom. Williams* v. *Rhodes*, 89 S. Ct. 5 (1968).

Then county and district mass meetings and a state convention must be arranged, convened, and held. Various certificates must be prepared, checked, signed and acknowledged by state and county party officials, and filed. And additionally, in the case of this party, the task of mounting a delegate challenge at the 1968 Democratic National Convention was undertaken. All of this must be done in addition to the normal incidents of running a political campaign.

Under the best of conditions this was a monumental task. And the difficulty was compounded by the necessity for reconciling ambiguous sections of the code and then re-

ferring to the case law.[23] And there were petty harassments—the Secretary of State, when time was of the essence, corresponded with NDPA by fourth class mail (Cashin 220); again, in response to a request for copies of the evidence which she had announced would cause her to deny ballot position to NDPA, she offered to sell *certified* copies to the party's chairman for $126 (12 copies of 5 pages) and the offer itself was not mailed to the address at which the chairman had advised her he would be (Amos 67-69). In its Answer, the State contended that some NDPA candidates had been "contacted" and desired to withdraw[24] (R. 285, 306). One of the Judges of Probate's response to the certificate of mass meeting filed by NDPA nominees for the purpose of getting on the ballot concluded:

> Personally, I do not think the paper you sent is worth the paper it is written on. I will discuss it with Mrs. Amos as to whether or not I will place the names on the ballot for the November election, or not (R. 196).

In fact the Secretary of State and Judges of Probate (see the affidavits attached to the Answer, R. 291-327)

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[23] For example, see Title 17 §§413 and 145, Code of Alabama (Recomp. 1958) which deal with selection of candidates by parties that do not hold primaries and the placing of them on the ballot, respectively. Literally, §145 would not make a §413 selection the exclusive means of selection; however, the case law, as shown by the annotations to §145, reveals that the section simply is not interpreted to mean what it says.

[24] *Cf.* Herndon v. Lee, 281 Ala. 61, 199 So. 2d 74 (1967) where the shoe was off the other foot: for technical reasons a withdrawal of candidacy was necessary at one point for the Negro candidate to be placed on the ballot and his oral withdrawal was held to be a nullity.

shifted the burden of responsibility established by Alabama Law. *Kinney* v. *House,* 243 Ala. 393, 10 So. 2d 167 (1942) held that the Judge of Probate may, even though he acts in a ministerial capacity, make investigation of an arguably defective certificate to determine whether the statutory requirements were met. But here the Judges, even without investigation, diligently sought grounds to reject certificates on their face value.

Despite state obstacles and even though dealing with inexperienced, sometimes illiterate or semi-literate, newly registered voters, many of whom do not even have telephones, the NDPA substantially complied with Alabama's undecipherable election law. The compliance may have been accidental but compliance it was.

**B. *The Constitutional Imperatives.***

**1. The Fourteenth and Fifteenth Amendments.**

The right to participate in the political process whether it be running for public office, creating a political party, or voting for the candidate of one's choice is at the very heart of the democratic system. *Carrington* v. *Rash,* 380 U. S. 89 (1965). See *Reynolds* v. *Sims,* 377 U. S. 533, 555, 567 (1964); *Wesberry* v. *Sanders,* 376 U. S. 1, 17 (1964).

This Court has consistently held that qualified citizens have a constitutionally protected right to vote and have their votes counted. *Ex parte Yarbrough,* 110 U. S. 651 (1884); *United States* v. *Mosley,* 238 U. S. 383 (1915); *United States* v. *Classic,* 313 U. S. 299 (1941); *Baker* v. *Carr,* 369 U. S. 186 (1962); *Reynolds* v. *Sims,* 377 U. S. 533 (1964). The right to run for office, to give the voter someone for whom to have his vote counted, is the other side of the same coin:

> From time immemorial an election to public office has been in point of substance no more and no less than the expression by qualified electors of their choice of candidates. *United States* v. *Classic,* 313 U. S. 299, 318 (1941).

And:

> "Fencing out" from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. "[T]he exercise of rights so vital to the maintenance of democratic institutions," *Schneider* v. *State of New Jersey,* 308 U. S. 147, 161 . . . cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents. *Carrington* v. *Rash,* 380 U. S. 89, 94 (1965).

To secure this right Negroes have been forced to struggle against grandfather clauses[25], *Guinn* v. *United States,* 238 U. S. 347 (1915); poll taxes, *Harper* v. *Virginia Board of Elections,* 383 U. S. 663 (1966); *Harman* v. *Forsennius,* 380 U. S. 528 (1965); educational and registration requirements, *South Carolina* v. *Katzenbach,* 383 U. S. 301 (1966); restrictions on membership in a political party, *Smith* v. *Allwright,* 321 U. S. 649 (1944); *Nixon* v. *Condon,* 286 U. S. 73 (1932); *Nixon* v. *Herndon,* 273 U. S. 536 (1927); gerrymandering, *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960); outright fraud and intimidation, *United States* v. *Classic,* 313 U. S. 299 (1941). Slowly at first—then

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[25] Compare the political heritage of ADP members who, as children, went into the cotton fields with their grandfathers as they campaigned for office (Mims 9, Little 8).

surely, then swiftly the courts and Congress moved against voter discrimination.

The cadence call on the march to equal voting rights was enunciated by Mr. Justice Frankfurter in 1939. The fifteenth amendment, he said, " . . . nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." *Lane* v. *Wilson*, 307 U. S. 268, 275 (1939).

It was under this judicial umbrella that Congress moved to adopt the Voting Rights Act upheld in *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966) and *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966). And it is on this judicial and legislative landscape that this case arose.

**2. The First Amendment.**

Democratic government requires that all points of view be allowed expression. Even error has value as it helps reveal truth in its full dimension.

For many the essential meaning of the first amendment is that it protects all political thought and expression. See A. Meiklejohn, *Political Freedom* (1965). This facet of the first amendment has been emphasized:

> The maintenance of the opportunity for free political discussions to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. *Stromberg* v. *California*, 283 U. S. 359, 369 (1931). See *Garrison* v. *Louisiana*,

379 U. S. 64, 74-75 (1964); *Bond* v. *Floyd*, 385 U. S. 116 (1966); *Williams* v. *Rhodes*, 89 S. Ct. 5 (1968).

The further relationship of the first amendment to political activity is shown by the protection it provides to freedom of association. See, *e.g.*, *NAACP* v. *Alabama*, 357 U. S. 449, 460 (1958).

To deny plaintiffs their right to run for elective office, to vote for candidates of their own choosing, to have those votes counted, and those elected serve is more than a deprivation of fourteenth and fifteenth amendment rights. For here the very existence of the NDPA and the enhancement of advocacy gained by group association is threatened.

The end sought by those who speak politically is action based upon belief. Without candidates and a party organization plaintiffs, who are committed to racial integration and liberal economic policies, are deprived of their very means of expression and the opportunity to seek change by peaceful, lawful, and traditional methods.

Political campaigns involve or ought to involve more than the seeking of office for personal or political gain; they present opportunities for educating the citizenry. Plaintiffs simply seek the opportunity to continue a political program aimed at convincing a majority of Alabama's electorate that the interests of Negroes and whites are allied, their goals common. No higher priority exists in our constitutional democracy than the protection of legal means which provide an opportunity for accomplishing change. That is what this case is about.

### 3. Proof of Discrimination and the Burden Thereof.

Common sense, history[26], experience[27], and judicial precedent suggest that the gross discrepancy between Negro and white candidates for public office, and Negro and white public officeholders and state party officials raises at least an inference that Negroes have in fact been systematically and almost totally excluded from Alabama's political processes.

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[26] See E. M. MORGAN, BASIC PROBLEMS OF EVIDENCE 360 (1962): ". . . in most instances the historical fact is a subject of judicial notice"; *accord,* Morris v. Harmer's Heirs' Lessee, 32 U. S. (7 Pet.) 553, 558 (1833). For a number of years this has been the rule in the Fifth Circuit. See United States *ex rel.* Goldsby v. Harpole, 263 F. 2d 71, 82 (5th Cir.), *cert. denied* 361 U. S. 838 (1959) (". . . it is our duty to take judicial notice that lawyers residing in many southern jurisdictions rarely, almost to the point of never, raise the issue of systematic exclusion of Negroes from juries."); Meredith v. Fair, 298 F. 2d 696, 701, *cert. denied* 371 U. S. 828 (1962); United States *ex rel.* Seals v. Wiman, 304 F. 2d 53 (5th Cir. 1962), *cert. denied,* 372 U. S. 915 and 924 (1963). Here, as in Seals, the discrimination is "long continued," 304 F. 2d at 67. See Smith v. Paris, 257 F. Supp. 901, 904 (M. D. Ala. 1966), *modified and aff'd,* 386 F. 2d 979 (5th Cir. 1967) and cases there cited (court must take into account the long history of racial discrimination in Alabama and view legislative purpose in this light). Regarding the effect of a history of discriminatory practices, see Patton v. Mississippi, 380 U. S. 128, 143, 144 (1965).

The judicial use of southern history in the racial-electoral context is illustrated by United States v. Louisiana, 225 F. Supp. 353 (E. D. La. 1963) (three-judge court), *aff'd,* 380 U. S. 145 (1965).

Unfortunately, we often " . . . need education in the obvious more than investigation of the obscure." HOLMES, LAW AND THE COURT, in COLLECTED LEGAL PAPERS 291, 292-93 (1921). "The plaintiffs here only want 'for the Court to see what "[a]ll others can see and understand • • •"' United States v. Mississippi (S. D. Miss., 1964), 229 F. Supp. 925, 998 (dissenting opinion) reversed, 1965, 380 U. S. 128 . . . ." Hamer v. Campbell, 358 F. 2d 215, 220 (5th Cir. 1966).

[27] *Cf.* the judicial cognizance based in part on the experience of this Court, in Walker v. City of Birmingham, 388 U. S. 307, 325 n. 1 (1967) (Warren, C.J., dissenting).

The existence of the gross discrepancy here is undisputed. In *United States* v. *Jefferson County Bd. of Educ.*, 372 F. 2d 836, 887 (1966), *aff'd on rehearing en banc*, 380 F. 2d 385 (5th Cir.), *cert. denied*, 389 U. S. 840 (1967), the court said:

> This Court has frequently relied on percentages in jury exclusion cases. Where the percentages of Negroes on the jury and jury venires is disproportionately low compared with the Negro population of a county, a prima facie case is made for deliberate discrimination against Negroes [footnote omitted]. Percentages have been used in other rights cases [footnote omitted]. A similar inference may be drawn in school desegregation cases, when the number of Negroes attending school with white children is manifestly out of line with the ratio of Negro school children to white school children in public schools.

See the use of statistics in the first § 4(a) Voting Rights Act declaratory judgment action to come to trial, *Gaston County* v. *United States*, 288 F. Supp. 678 (D. D. C. 1968). There, according to the majority, the statistical showing that Negroes were more poorly educated than whites was sufficient to establish that the literacy test was a prohibited test or device; the concurrence was based only on the county's failure to adduce evidence to rebut the statutory presumption that the literacy test was discriminatory. The presumption also applies to Alabama. See also *Whitus* v. *Georgia*, 385 U. S. 545, 552, n. 2 (1967), citing Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338 (1966); *Brown* v. *Allen*, 344 U. S. 443, 473 (1953); *Smith* v. *Texas*, 311 U. S. 128, 130-31 (1940).

Moreover, where fundamental freedoms are involved, the state, not the challenging party, has the burden of demonstrating that equal protection and due process standards have been met. In *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966), this Court striking down Virginia's poll tax, said:

> We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined [citations omitted]. . . . the right to vote is too precious, too fundamental to be so burdened[23] or conditioned. 383 U. S. at 670.

Surely the same considerations apply here as in *Harper;* the defendants are not merely infringing on the rights of members of plaintiffs' class; they are seeking to deny them the essential right of free men—the right to vote.

It has been recognized in many instances that, in order to remedy past racial discrimination in the field of voting rights, a positive effort must be made to provide Negroes with the rights and opportunities previously denied them. *United States* v. *Louisiana*, 380 U. S. 145 (1965); *United States* v. *Duke*, 332 F. 2d 759 (5th Cir. 1964). See also Cox, *Constitutional Adjudication and the Promotion of*

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[23] But the majority below placed the burden on plaintiffs. "As a prerequisite to that relief at the hands of the court they [plaintiffs] must show that they are qualified to be on the ballot" (R. 547). Then, when plaintiffs attempted to meet that burden the majority did ". . . not decide the complex factual issues of whether mass meetings, including the Huntsville meeting, were held and whether candidates purportedly nominated at such meetings were validly certified" (R. 560). Thus plaintiffs were again put at the mercy of the very state officials who originally sought to disenfranchise them; *cf.* the contempt proceedings herein.

*Human Rights*, 80 HARV. L. REV. 93 *passim* (1966). "[T]he Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination." *United States* v. *Jefferson County Bd. of Educ.*, *supra*, 372 F. 2d at 876. Negroes may have to be sought out purposely to be placed on jury lists. *Brooks* v. *Beto*, 366 F. 2d 1 (5th Cir.), *cert. denied*, 386 U. S. 975 (1966). It may be necessary to relax voter qualifications in order to equalize the opportunity of Negroes and whites to register to vote. *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966); *Gaston County* v. *United States*, 288 F. Supp. 678 (D. D. C. 1968).

As in *Williams* v. *Rhodes*, *supra*, 89 S. Ct. at 11, "[t]he State has here failed to show any 'compelling interest' which justifies imposing such heavy burdens on the right to vote and to associate."

Here, as in *Williams*:

> Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms. New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past. *Id.* at 11.

Here, as in *Williams*, " . . . the totality of the . . . restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause." *Id.* at 12.

As Mr. Justice Douglas said:

> When "fundamental rights and liberties" are at issue (*Harper* v. *Virginia Board*, *supra*, 670), a State has less

leeway in making classifications than when it deals with economic matters. I would think that a State has precious little leeway in making it difficult or impossible for citizens to vote for whomsoever they please and to organize campaigns for any school of thought they may choose, whatever part of the spectrum it reflects.

Cumbersome election machinery can effectively suffocate the right of association, the promotion of political ideas and programs of political action, and the right to vote. The totality of Ohio's requirements has those effects. It is unnecessary to decide whether Ohio has an interest, "compelling" or not, in abridging those rights, because "the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field." *Konigsberg* v. *State Bar*, 366 U. S. 36, 61 (1961) (Black, J., dissenting). Appellees would imply that "no kind of speech is to be protected if the Government can assert an interest of sufficient weight to induce this Court to uphold its abridgment." (*Id.*, at 67.) I reject that suggestion [footnote omitted]. *Id.*, at 15 (Douglas, J., concurring).

"The right to have one's voice heard and one's views considered by the appropriate governmental authority is at the core of the right of political association," said Mr. Justice Harlan. *Id.*, at 16 (Harlan, J. concurring in results). And, he would have held the due process clause applicable. *Id.* at 17.

As Mr. Justice Harlan put it:

". . . with fundamental freedoms at stake, such an unlikely hypothesis cannot support an incursion upon

protected rights, especially since the presence of eight candidacies cannot be said, in light of experience, to carry a significant danger of voter confusion. As both Ohio's electoral history [footnote omitted] and the actions taken by the overwhelming majority of other States [footnote omitted] suggest, opening the ballot to this extent is perfectly consistent with the effective functioning of the electoral process. In sum, I think that Ohio has fallen far short of showing the compelling state interest necessary to overcome this otherwise protected right of political association." *Id.* at 19.

Here, the concern of Mr. Justice Stewart seems met for in *Williams* he said, ". . . no claim has been or could be made in this case that anyone of these Amendments [the fifteenth, nineteenth, and twenty-fourth] has been violated by Ohio." *Id.* at 21 (Stewart, J. dissenting). Here just such a claim has been made and that claim is fully supported by the record and Alabama's history including that in this and other Courts.[29]

In Ohio men may be " . . . entirely free to assemble, speak, write, and proselytize as they see fit." *Id.* at 25. In Alabama that, unfortunately is not and has not been the case.[30]

The Chief Justice dissenting in *Williams* noted that:

. . . neither the American Independent Party nor the Socialist Labor Party made an effort to comply with

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[29] See cases cited notes 20 and 26, *supra*.

[30] For the history, in Alabama, of these rights is also studded with resort to the courts. See, *e.g.*, Thornhill v. Alabama, 310 U. S. 88 (1940) and Marsh v. Alabama, 326 U. S. 501 (1946); N. A. A. C. P. v. Alabama, 357 U. S. 449 (1958), 360 U. S. 240 (1959), 368 U. S. 16 (1961), 377 U. S. 288 (1964). *Cf.* New York Times Co. v. Sullivan, 376 U. S. 254 (1964).

> Ohio's election laws. Nor has either timely invoked the jurisdiction of the courts. That both had the opportunity to do so cannot be denied. *Id.* at 28 (Warren, C.J. dissenting) (and see the district court's opinion, 290 F. Supp. at 991).

But here plaintiffs moved with alacrity; it was not until the Secretary of State's September 10, 1968, refusal to certify the NDPA nominees that the situation was fully ripe for adjudication, suit was filed three days later (the "afterthought" issue—the Corrupt Practices Act—not being raised by defendants until September 17), and the first presentation to this Court was on October 12, 1968. And the case is still on an accelerated schedule.

In *Williams* the Chief Justice did:

> . . . not believe, however, as does Mr. Justice Stewart, that the Equal Protection Clause has only attenuated applicability to the system by which a State seeks to control the selection of Presidential electors. *Id.* at 31.

Here there are substantial equal protection questions at issue.[21]

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[21] Here, the statement of Mr. Justice White regarding the reasonableness of a primary of the type used in Ohio may not be applicable. In Alabama, there is no requirement of party registration; the previously white primary is open to all who desire to vote; thus Alabama is, in effect, a no-party state. Republicans, national Democrats, Wallacites (whether Alabama Democrats or prospective American Independent Party members), Negroes and others participate in the primary election as candidates and voters. No loyalty pledge is required of any of these voters; consequently the NDPA's Greene County candidates ran in the primary and attempted to run in the general election. *Cf.* in 1966 in Macon County where NDPA member Lucius Amerson was nominated in the Democratic primary election his white opponents refiled and

### C. *The "Garrett Law" Violates Section 5 of the Voting Rights Act of 1965 and the Fourteenth and Fifteenth Amendments.*

#### 1. The Voting Rights Act of 1965, § 5.

The Garrett Law established for Alabama a "standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964." Accordingly it clearly falls within the ambit of section 5, *supra*, 42 U. S. C. § 1973c.

The defendant Gallion, Alabama's "chief legal officer," *id.*, failed to submit the Garrett Law to the Attorney General of the United States and initiated no declaratory judgment proceedings regarding the statute.

The question here is less close than in *Sellers* v. *Trusell*, 253 F. Supp. 915, 918 (M. D. Ala. 1966) (three-judge court), *appeal dismissed*, 385 U. S. 19 (1966) where Circuit Judge Rives noted that "[t]he legislative history shows that the present language was meant to broaden the section [5, *supra*] and make it all-inclusive of any kind of practice." 253 F. Supp. at 918. The majority of the district court cited this case without discussion, apparently preferring to bottom its holding on a Mississippi three judge district court's contrary decisions in the three cases that were argued in this Court on October 15, 1968[32] (R. 557-58).

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ran against him successfully in the 1966 general election. Thus, in Alabama, without party registration the primary provides no ". . . opportunity for the presentation and winnowing down of candidates which is surely a legitimate objective of state policy." Williams v. Rhodes, *supra*, 89 S. Ct. at 26 (White, J. dissenting).

[32] Whitley v. Williams, No. 36 (1968 Term); Bunton v. Patterson, No. 26 (1968 Term); Fairley v. Patterson, No. 25 (1968 Term).

The Garrett Law, on its face, establishes a different "standard," a different "practice," and a different "procedure." The only question is "does it relate to voting?" The answer is found immediately in the definitional section, Section 14(c)(1), 42 U. S. C. 1973l(c)(1), which makes the term "voting" inclusive of "all action necessary to make a vote effective . . . ." See *United States* v. *Classic,* 313 U. S. 299, 318 (1941). The district court's opinion in *Socialist Labor Party* v. *Rhodes, supra,* recognized the inseparability of voting and candidacy in the constitutional context:

> The right to vote is the right to vote freely and without unreasonable prohibitions as to the candidate of one's choice.
>
> . . . The denial of this unfettered freedom of choice is a denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment. 290 F. Supp. at 987; see *id.* at 990.

That Negroes have historically been deprived of the right to vote is clear. That they are being prevented from running for office is equally clear. And, since without candidates it is quintessentially clear that there can be no election; no voting at all, the Garrett Law violates section 5. *Cf. Political Participation,* ch. 2, "Preventing Negroes from Becoming Candidates or Obtaining Office," 40-59.

**2. The Fourteenth and Fifteenth Amendments and the Precepts of *Harman* v. *Forsennius*, 380 U. S. 528 (1968).**

*Harman* v. *Forsennius* voided Virginia statutes requiring, as an alternative to payment of the poll tax, the filing of a certificate of residence six months in advance of an

election (*cf.* the Garrett Law's eight month filing deadline). It was said:

> Another objection to the poll tax raised in the congressional hearings was that the tax usually had to be paid long before the election—at a time when political campaigns were still quiescent—which tended to eliminate from the franchise a substantial number of voters who did not plan so far ahead. *Id.* at 539-40.
>
> . . . .
>
> This is plainly a cumbersome procedure. *Id.* at 541.
>
> . . . .
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> In addition the certificate must be filed six months before the election, thus perpetuating one of the disenfranchising characteristics of the poll tax which the twenty-fourth amendment was designed to eliminate. *Id.* at 542.

In *Williams* v. *Rhodes, supra,* the Ohio law which required Garrett Law type action 272 days prior to the general election was declared unconstitutional at the request of George C. Wallace. But, in Alabama the Garrett Law which requires the filing of a declaration of intention 250 days before the general election was used to deny NDPA nominees, most of whom are Negroes, the right to run for elective office.

The defendant Secretary of State attempted to utilize an Alabama statute to deprive plaintiffs of their civil and political rights. In truth, to utilize a phrase but recently politically current, "there's not a dime's worth of difference between" the Alabama and Ohio statutes.

The Garrett Law has the additional infirmity of its being utilized as one of the instruments to deny Negroes the

right to run for public office. And, if applied to the plaintiffs it will deprive the voters of Alabama of the opportunity to vote for Negro candidates.

The majority below held that the law was not racially motivated; be this as it may there does appear to be truth in defendants' counsel's argument below that

> "if I were hunting the target, I would say that the target might have been those groups posing some substantial threat throughout the State of Alabama officeholderwise . . . " (R. 417).

*Cf.* the two major parties' attempt to monopolize Ohio politics in *Williams* v. *Rhodes;* but there has traditionally been only one major party in Alabama.

And, as Judge Johnson, dissenting here, said:

> Indeed, as the majority recites, it is generally accepted that the Garrett Law:
>
> "was intended to correct what the legislature viewed as an inequity against a party nominating by primary (presently only the Democratic Party), arising from the fact that parties nominating by other methods could hold back deciding upon candidates and selectively choose and place their candidates against the potential nominees by primary who appear most vulnerable."
>
> Protection of one political party from another political party is not a permissible object of legislation. Even if it be thought permissible, it would scarcely justify the adverse impact which this statute has on the right to an effective vote for the candidate of one's choice. Here, the process of choice of candidates is

cut off at an unreasonably early date. The candidates who seek relief from this Court find themselves in almost precisely the situation George C. Wallace found himself in by reason of an Ohio law that required a petition for nomination to state office (in this case, that of presidential elector) be filed at least 90 days before the primary election rather than the general election (R. 564-65).

**D. *Plaintiffs Seasonably Complied with the Disputed Sections of the Corrupt Practices Act, Title 17 §§ 274-75 Code of Alabama (Recomp. 1958) and, Alternatively, Said Sections Are Unconstitutional and in Conflict with the Voting Rights Act of 1965 on Their Face and as Applied, Having Been Discriminatorily Invoked as an Afterthought With Intent to Disenfranchise.***

Judge Johnson's dissent discussing the State's " . . . first foray in the enforcement direction against a small, new and almost impecunious group of candidates . . . " (R. 564)

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[33] The factual details of compliance with these statutes are set forth *supra*, at pp. 9-10, 21-22 (see also R. 236-39, 246-50).

Compare the compliance of these "impecunious" and politically unsophisticated plaintiffs with the acts of some others. See, *e.g.*, "Nixon Fund Report Filed 9 Days After Deadline fixed under Law," New York Times, Nov. 5, 1968, at 30, cols. 1-2; "7 Fund Groups for Nixon File Late Data on Gifts," New York Times, Nov. 13, 1968, at 18, cols. 4-7; "4 More Nixon Groups File Fund Data," New York Times, Nov. 14, 1968, at 35, cols. 2-4; "Nixon-Agnew cols. 1-2; cost put at $17 million," Atlanta Journal, Nov. 15, 1968, at 14-A; "Nixon-After Deadline Report Raises Tally to $14.6 Million," Atlanta Journal, Nov. 25, 1968, at 2-C, cols. 1-3; Buchwald, "Devotion to Law and Order, Defense Fund for Fund-Raisers," Atlanta Journal, Nov. 29, 1968, at 23-A, cols. 1-3.

Sec. 274 compliance by other candidates was made in almost every instance on forms used for compliance with the Garrett Law. Thus, if the Garrett Law is declared unconstitutional on its face or in its application or is in violation of the Voting Rights Act of 1965, their compliance may also have been untimely as being too soon. Of course, the state would suffer no more injury by early than late filing.

should have disposed of defendant's last ditch attempt to "protect" the "2000 Democratic offices" (Cashin 217) from general election competition with Negro and liberal white candidates: the pertinent portion of this opinion is set forth *supra* at pp. 13-14, and at (R. 563-64).

**1. By Disqualifying a Candidate Who Fails to File or Files Late the Name of a Finance Committee, Rather Than Pursuing Less Drastic Remedies, Alabama Deprives Both the Candidate and the Voters of Due Process.**

Disqualification is an excessively harsh remedy and penalty. Assuming the state's legitimate interest is prohibiting transactions of the type envisaged by the Corrupt Practices Law, Tit. 17 §§ 268-86, Code of Alabama (Recomp. 1958), it still must take the "least drastic alternative" to achieve its lawful end. *Dean Milk Co.* v. *City of Madison,* 340 U. S. 349 (1951).

The principle operates even more particularly where fundamental human rights and freedoms are involved. See *Sherbert* v. *Verner,* 374 U. S. 398 (1963); *Griswold* v. *Connecticut,* 381 U. S. 479 (1965) (particularly the concurring opinions, *Id.* at 497-99, 503-07); Struve, *The Less Restrictive Alternative Principle and Economic Due Process,* 80 *Harv. L. Rev.* 1463 (1967).[34] In regulating the right to vote, the state must, likewise, comply with the standard of "the least drastic alternative."

*Cf. King* v. *Smith,* 392 U. S. 309, 88 S. Ct. 2128 (1968), where, although the Court did not reach the constitutional

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[34] In fact, in Ratner, THE FUNCTION OF THE DUE PROCESS CLAUSE, 116 U. PA. L. REV. 1048, 1086 (1968), it is suggested that the "less intrusive alternative" principle comes into full play *only* where fundamental rights are involved.

issue, 88 S. Ct. at 2131, it did analyze the problem in terms of alternatives available to the state; and Alabama's blunderbuss approach was curtly dismissed.[35]

The rationale applies here. The right to seek public office and to a free choice of candidates for whom to vote are too precious to be defeated by a technical requirement when less drastic means serve the same purpose.

The unimportance to Alabama of the filing date seems as clear where the candidates are white as the date itself seems unclear where the candidates are black.[36] The annotations to Title 17 § 274, Code of Alabama provide:

> Candidate is entitled to have name placed on ballot where such candidate, within the time for qualifying, withdraws and requalifies, thus complying with the law in all respects, regardless of whether he had previously announced his candidacy and failed to comply with this section at that time. Rep. Atty. Gen., 1936-38, p. 575.

In *Jones* v. *Phillips*, 278 Ala. 354, 185 So. 2d 378 (1966), the court "reluctantly" held that Jones could not be placed on the ballot because of this section even though "[h]e did no more than overlook a mandatory rule which applied to his qualifying as a candidate .... He overlooked the filing of a necessary paper within the statutory period allowed, but this was no more 'corrupt' than a person who over-

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[35] As noted in the concurring opinion, the state was punishing the child for "the 'sin' of the mother." 88 S. Ct. at 2142.

[36] At least as to those candidates who filed the Garrett Law declarations, the Answer placed the state in the position of saying that the Corrupt Practices Act Statement was filed too soon (R. 278); that position illustrates the egregious particularity with which they are seeking to enforce the technical requirements of the election law against NDPA and its candidates.

looks the scheduled departure of a train or plane and thereby misses his trip or connection." 185 So. 2d at 381. The court also took this opportunity enthusiastically to endorse reliance on the "long-standing administrative interpretation . . . ." *Id.*

Nevertheless, in *Herndon* v. *Lee,* 281 Ala. 61, 199 So. 2d 74 (1967) the Reverend James E. Gilmore (now active in NDPA affairs) had in May 1966 filed a certificate of nomination as the candidate of the Greene County Freedom Organization for Sheriff but did not then file the Corrupt Practices Act appointment. About fifteen days later he orally informed the Probate Judge that he was not a nominee of that party. Then in September he refiled for the same office but not as a candidate of the Greene County Freedom Organization. This filing was accompanied by the Corrupt Practices Act appointment. Apparently because the notice of withdrawal was not in writing his May filing was held to be still in effect and he was denied a place on the ballot for failure to comply with § 274.

The state does have a legitimate interest in regulating the finances of political campaigns. But there are alternative means, such as civil penalties, which may achieve this end. To disqualify a candidate otherwise genuinely selected, when there is no showing that the candidate has, in fact, defrauded or is, in fact, at least intending to defraud, is wrong. The "least drastic alternative" was not taken.

**2. Wholesale Effective Disenfranchisement of Voters for the Nonfeasance of Their Candidate Is Prohibited by the Voting Rights Act of 1965.**

As already noted, *supra,* pp. 15, 17-18, 26-28, race and politics are inseparable in Alabama. See *Political Partici-*

*pation*, 48, 70-71, 101-04, 122, 144, 149, 155, 157, 159, 166. Denial of the opportunity to vote for NDPA nominees is inextricable from the state's racial problems and must be scrutinized with an eye to the Voting Rights Act of 1965, particularly §§ 2 (abridgement of the right to vote on account of race), and 4 (racially discriminatory devices or tests), 42 U. S. C. §§ 1973, 1973b. Since the state may not "deny or *abridge*," *id.* § 2 (emphasis added) the right, *a fortiori* these sections encompass the voter's simple civil right to have the names of candidates for whom to vote placed on the ballot. The attempt to apply the Alabama Corrupt Practices law against every one of the NDPA candidates (even though many had actually filed the statement) violated this right.[37] Particularly in cases with overtones of racial discrimination, it is necessary "... for a court to assess the potential impact of official action in determining whether the State has significantly involved itself with invidious discriminations." *Reitman* v. *Mulky*, 387 U. S. 369, 380 (1967).

The device of disqualification, if allowed, to succeed, would negate the voter's choice and frustrate their right to vote. This is the evil, the "test or device," at which the Voting Rights Act of 1965 was aimed.

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[37] Even the South Carolina Democratic Executive Committee has recognized the injustice of this procedure. A Negro candidate received a plurality in the Hampton County primary election "... but was disqualified from the run-off by the County Democratic Executive Committee because he failed to file a statement of campaign finances immediately after the election as required by party rules. [T]he State committee reinstated him as a run-off candidate, ruling that no one had been prejudiced by his failure to file a timely financial statement." POLITICAL PARTICIPATION, 136-37.

**E. *Title 17 § 148 Code of Alabama Unconstitutionally Provides That "the Name of Each Candidate Shall Appear but One Time on Said Ballot, and Under Only One Emblem."*** [38]

Prior to September 5, 1968, there were some doubts as to the legal status of the AIDP and its plans for the future. The NDPA desired to strengthen rather than dilute the vote of the nominees of the Democratic Party for President.

Upon inquiry as to whether the AIDP would be willing to allow that Party's nominees for Presidential Elector to also appear under the NDPA emblem, § 148, *id.*, was felt by the AIDP to bar such action. Were this section not operative, NDPA nominees for Presidential Elector would have been withdrawn and replaced by those of AIDP (R. 356). As it is, NDPA nominees for Presidential Elector, different from the AIDP nominees, appeared under the NDPA label.

Counsel have found no federal adjudications of the constitutionality of such a statute, but there are several state court cases. In *Murphy* v. *Curry,* 137 Cal. 479, 70 Pac. 461 (1902) a statute similar to § 148, *id.*, was declared unconstitutional. The California court said:

> It certainly must be true that a political party in convention assembled may nominate whomsoever it pleases for any office, provided that person have the proper legal qualifications. It is a drastic interference with the rights of such political parties to refuse any recognition to any of its nominees because, and only

[38] This provision has not been uniformly enforced. For example, plaintiff Robert P. Schwenn, Esq., of counsel here, has himself been twice on the same ballot (Schwenn 48-49).

because, some other political party has likewise seen fit to nominate him. . . . [i]f any confusion of political principles should thereby result, that is a matter wholly for the political parties themselves, and not at all for either the legislature or the courts. There can be no solid foundation in reason, therefore, for depriving one political party of the right to have placed upon its ballot the names of its nominees, *solely because some other political party has seen fit to select the same men*. . . .

Why, if it be the nominee's right to have the information conveyed to the voters, and if it be the state's duty to convey the information that he is the choice of one political party, should the law deprive him of the right to have the electors know that he is the choice of more than one party? The answer to this question will be found in what must have been the intent of the lawmakers,—to prevent the combination or fusion of two or more political parties by their selection in common of the same candidates. But until it is pointed out to us that such a combination or such a fusion is violative of the Constitution of the United States or of this State, or is against public policy, it must be held that the legislature herein has sought to exercise illegal control over political parties and their nominees, and in so doing has aimed an unwarranted blow at a vital principle of our republican government. *Id.*, 463-64.

Accord: *Hopper* v. *Britt*, 203 N. Y. 144, 96 N. E. 371 (1911); *Hopper* v. *Britt*, 204 N. Y. 524, 98 N. E. 86 (1912); *Callag-*

*han* v. *Voorhis*, 252 N. Y. 14, 168 N. E. 447 (1929).[39] We concede this is a minority view. See Annot. 78 A.L.R. 398.

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[39] The Liberal and Conservative Parties exist by virtue of these rulings in New York State. See Human Events, Dec. 28, 1968, "Rocky Knifing Conservatives," at 4, col. 2:

> Panicked by the growing strength of New York's Conservative party, the Albany front men for Nelson Rockefeller and Jacob Javits are readying legislation of dubious constitutionality designed to put the party out of business.
>
> Word was leaked last week that unnamed "political leaders" had drafted legislation that would prohibit a candidate from being nominated by more than one party—by the Republicans and the Conservatives, for instance, or by the Democratics and the Liberals.
>
> The New York *Times* noted that while the legislation would hurt both minor parties, it would hurt the Conservatives far more—since they have been gathering strength and the Liberals have been slipping.
>
> Liberal columnists Evans and Novak noted that the bill—designed to "squeeze the life out of the Conservative party"—was receiving crucial behind-the-scenes support from Gov. Rockefeller.
>
> Ironically, if Rocky's bill had been on the books in November, the Republicans would not have captured control of the State Assembly.
>
> The GOP eked out a 77-to-73 edge only because of the Conservatives. Five Republican assembly candidates running with Conservative endorsement unseated Democratic incumbents where the vote on the Conservative line represented the winning margin.
>
> Note: Rockefeller is pushing the bill despite the ruling of one top state official that it is unconstitutional. "Any bill that would inhibit a duly constituted political party from nominating a candidate of its choice, or would inhibit a candidate from accepting such a nomination, would, in my opinion, run afoul of the constitution," the official said. "I think the courts would be bound to strike it down."

**F. *Failure to Place the Full Slate of NDPA Nominees on the Ballot Deprives Plaintiffs of the Right to Vote a Straight Ticket in Violation of the Equal Protection Clause of the Fourteenth Amendment, the Fifteenth Amendment, and Article II, Section 1 (as Amended by the Twelfth Amendment), the Voting Rights Act of 1965, and Title 17, Sections 97, 157, Code of Alabama (Recomp. 1958), and Establishes the Applicatory Unconstitutionality of Id. § 148.***

**1. The Voting Rights Act of 1965.**

Section 4(c) of the Voting Rights Act of 1965, provides, in part:

> "[T]est or device" shall mean that any person as a prerequisite for voting . . . (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject . . . . Voting Rights Act of 1965, § 4(c), 42 U. S. C. § 1973b(c).

As has been amply demonstrated the Alabama ballot (Amos Pl. Exh. G) for the November 5, 1968, general election was a stiff test even for the literate voter;[40] the inclusion of AIDP Presidential Elector nominees "out there by themselves" (Cashin 218) was at the heart of the problem. And, from all appearances the arrangement was deliberately, not accidentally, confusing. See *supra* pp. 18-21.

**2. Equal Protection.**

The touchstone of the equal protection argument is that any abridgement of the right to vote, run for office, or par-

[40] Voters are limited to "five minutes in . . . the polling place . . . ." Title 17 §§176, 177 Code of Alabama (Recomp. 1958).

ticipate on an *equal* basis in the electoral process can only be justified upon a showing of necessity. "Our constitution leaves no room for classification of people that unnecessarily abridges that right." *Wesberry* v. *Sanders,* 376 U. S. 1, 18 (1964).

Equal protection guaranteed straight ticket voting in *Hopper* v. *Britt,* 203 N. Y. 144, 96 N. E. 371 (1911). There a statute denied straight ticket voting to parties which had not received more than 10,000 votes in the last election. The court, in an opinion which could well have served as the precursor of the Voting Rights Act of 1965, held that this arrangement violated the federal and state constitutions:

> . . . in our opinion the Constitution, by providing that certain officers shall be chosen by the electors, does guarantee that each voter shall have the same facilities as any other voter in expressing his will at the ballot-box, so far as practicable. . . . Some impediments to the exercise of the right to vote are . . . unavoidable, and when those impediments are dependent on circumstances and conditions not connected with the status of the candidates . . . they rarely affect the result of an election; the losses of one candidate being offset by those of the others. Not so with the impediments of the kind prescribed by this statute, which are directed solely at the character of the particular nominee for whom the vote is to be cast. . . . It does not tend to make voting easier for the elector, or to avoid confusion on his part, but has the contrary effect. . . . While the Constitution does not guarantee that the elector shall be allowed to express his vote by a single mark, our position is that he is guaranteed the right to express

his will by a single mark if other voters are given the right to express theirs by a single mark and there is no difficulty in according the right to all. It is said by the Supreme Court of Ohio in State v. Bode, 55 Ohio St. 224, 45 N. E. 195, 34 L. R. A. 498, 60 Am. St. Rep. 696, in upholding a law of this kind: "There is no discrimination against or in favor of any one; and, if any equality [*sic*] arises, it arises not from any inequality caused by the statute, but by reason of inequalities in the persons of the voters, and such inequalities are unavoidable. It is always much more difficult for some electors to cast their ballots than others. Distance, bad roads, means of transportation, bad health, and many other considerations may and do render it much more difficult for some men to cast their ballots than others. But these difficulties inhere in the men themselves, and not in the law. * * * The inconvenience is only that experienced by every one who votes other than a straight ticket." This argument ignores the distinction between difficulties or inconveniences occurring by nature or accident and inconvenience created by statute. Inequality in the facilities afforded the electors in casting their votes may defeat the will of the people as thoroughly as restrictions which the courts would hold to operate as a disenfranchisement of voters. . . . We therefore hold the statutory provisions challenged to be unconstitutional because they unnecessarily and substantially discriminate between electors in the opportunities and facilities afforded for voting for the candidates of their choice. If the discrimination were trivial, our decision would be different, but we know from the election litigations that have come before us that the discrimination here is of a very substantial

character, and, where voting machines are used, the difficulty of voting a split ticket is still greater than where voting is by ballot. 96 N. E. at 373-74.

### 3. Title 17 § 148 Code of Alabama (Recomp. 1958) Is Unconstitutional as Applied.

Regardless of what might be said for the conflicting views on the abstract constitutionality of a statute prohibiting multiple ballot appearances, an entirely separate problem arises with the application of *Id.* § 148 to the facts of this case. Were it not for the prohibition in the last sentence of this section, the problems of tests, devices, straight ticket voting, as complicated by the existence of AIDP, would, before the election, have been eliminated (R. 356). It is this section which, under the circumstances, effectively contravenes the Alabama statutory guarantee of straight ticket voting, *Id.* §§ 97, 157, and effectuates a "test or device" by requiring an understanding and a literacy test, and will disenfranchise thousands of voters for whose benefit the Fourteenth and Fifteenth Amendments and the Voting Rights Act of 1965 exist.

### G. *Code of Alabama, Title 17 § 125 Which in Effect Provides That Election Officials Will Come Only From the Two Major Parties Violates the Equal Protection Clause of the Fourteenth Amendment.*

Discrimination against any party's nominees violates the equal protection clause as to the voters, the candidates, and the party. Title 17 § 125 Code of Alabama (Recomp. 1958) allows "each political party or organization having made nominations . . . " to furnish a list from which

> an inspector and clerk shall be appointed for each voting place; provided, that where there are more than

> two lists filed, the appointments shall be made from the list presented by the two political parties having received the highest number of votes in the state in the next preceding regular election, if each of said parties present a list.

Where there are three or more parties, the discrimination is almost too clear for argument. See *e.g., Socialist Labor Party* v. *Rhodes, supra,* 290 F. Supp. at 987, 990.

The inspectors are the chief election officials. They are to: certify and post the election results, Title 17 § 128, Code of Alabama (Recomp. 1958), meet (with the clerks) at the polling place and open the polls and proclaim them open, §§ 131, 173, *Id.;* appoint a returning officer in the absence of the regular one, § 134 *Id.;* receive and utilize the list of all registered voters in the precinct, §§ 136-38 *Id.;* sign the certificate of election and deliver it to the returning officer, § 139 *Id.;* seal the poll list, § 140 *Id.;* receive challenges, § 143 *Id.;* be, with other officials, the only persons continuously permitted within thirty feet of the polling place, § 144 *Id.;* be in charge of matters relating to voting machines at the polls and instruct people in their use, §§ 102-107 *Id.;* handle, with the clerks, the absentee ballots, §§ 64 (25), 64(26), 64(30) *Id.;* hand out ballots, § 175 *Id.;* assist illiterate and handicapped voters in signing their names, § 175(1) *Id.;* challenge persons offering to vote, tender, read, and administer to them an oath, § 188 *Id.;* receive proof of identity and residence of challenged voters, § 189 *Id.;* reject persons challenged upon refusal to take the oath, § 190 *Id.;* inform such persons of the penalties of perjury before administering the oath, § 191 *Id.;* count the votes and determine validity of ballots, §§ 192, 193 *Id.;* and, with

other election officials, be responsible for delivering, tallying, sealing, etc. of the ballots, §§ 194, 194(1), 195 *Id.*[41] Also, and of particular importance, § 176 *Id.* provides:

> Any elector applying to vote who shall state to any of the inspectors that by reason of his inability to write the English language, or by reason of blindness or the loss of the use of his hand or hands, he is unable to prepare his ballot, may have the assistance of any person he may select. In such case said elector must remain within the polling place and the inspector shall send for the person selected; if the person can not be found, then any other person such elector may select. . . . No elector shall remain more than five minutes in, nor shall he be permitted to take his ballot from the polling place.

Thus, particularly in light of the five minute provision (also at § 177 *Id.*), assistance to illiterate and inexperienced voters is dependent upon the good faith and cooperation of the inspectors. This good faith and cooperation have not always been forthcoming, in Alabama and throughout the South. See *Political Participation* 71, 101-104, and see generally *Id.* at 60-114. See also, *infra, passim.*

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[41] The various sections cited in this paragraph, particularly those dealing with voter lists and challenges, set up a procedure that enables those with access to the lists and ballots to determine how any particular person voted. This is apparently the state's method for preserving information for deciding challenges and election contests; as such it is not challenged in this suit but the potential for abuse in Alabama's racial climate further underscores the need for checks and balances to protect all political groups.

## II.

**The Evidence of Defendant Herndon's Contempt of This Court's Orders of October 14 and 19, 1968, Is Clear. Consequently, the Vindication of Those Orders and the Integrity of the Judicial Process Require the Formulation and Enforcement of an Effective and Deterrent Remedy.**

### A. *The Legal Setting.*

Here, as in *United States* v. *Shipp*, 203 U. S. 563, 573 (1906) this Court, prior to noting probable jurisdiction "... had authority from the necessity of the case, to make orders preserving the existing conditions and the subject of the petition ...." Here, as in *Shipp*, a determination of the facts may call for remedial or, perhaps, criminal penalties.[42] *United States* v. *Shipp*, 214 U. S. 386 (1909); *United States* v. *Shipp*, 215 U. S. 580 (1909).

Even if the defendant's conduct were also a violation of the orders of the court below this would afford "no reason why it is not also a contempt of this court." *Merrimack River Savings Bank* v. *City of Clay Center*, 219 U. S. 527, 536 (1911).

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[42] See 1 THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDRICK POLLOCK 151-52 (M. D. Howe ed. 1941):

> I am up to my ears in work as usual; just now reading the evidence to see whether we shall punish some alleged murderers and connivers at murder for—contempt of court in so doing! A negro convicted of rape and sentenced to be hung had asked for a *habeas corpus* and had taken an appeal to our Court on the ground that his trial was a tragic farce. Whereupon he was taken out of jail and lynched. The State to which punishment of the murder belongs will do nothing but we had to take steps to deal with the contempt of our authority—which we have done, in your chancery's delightful phrase, with all deliberate speed.

Nor has this Court been able ". . . to attribute to Congress an intent to award favored treatment to a person who is contemptuous of two or three orders instead of only one." *United States* v. *Barnett*, 376 U. S. 681, 692 (1964). Regarding civil contempt there can be no doubt of this Court's power to cause compliance with its orders. See, *e.g.*, *Id.*, 376 U. S. at 753-54, 726 n. 6 (dissenting opinions of Goldberg and Black, J.J.).[43]

Evidence of defendant Herndon's contempt has been acquired in the District Court by plaintiffs and the United States.[44]

This procedure is comparable to that followed in *Shipp* which ". . . was a case of original jurisdiction in this Court, testimony . . . then taken before a commissioner, not a jury . . . [citations omitted]." *United States* v. *Barnett*, *supra*, 376 U.S. at 697-98.

And, in any event, this Court judicially knows matters contained in the Records of this case. See, *e.g.*, *National Fire Ins. Co.* v. *Thompson*, 281 U. S. 331 (1930); *United States* v. *Pink*, 315 U. S. 203, 216 (1942) and cases cited therein. *Cf. Trailmobile Co.* v. *Whiels*, 331 U. S. 40 (1947).

Since the defendant Herndon after presentation of a series of reasons for not placing the names of the NDPA

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[43] See also GOLDFARB, THE CONTEMPT POWER 175 (1963): "Interestingly, even Justice Black has found no fault with summary proceedings for civil contempts though he has suggested that all criminal contempts be tried by a jury."

[44] Motions to transmit the depositions taken there since the November 5, 1968, general election will be made. Those depositions are referred to herein by the name of the deponent. Additionally, affidavits of plaintiffs and other evidence have been procured and are being filed simultaneously with the filing of this brief and as an appendix hereto.

on the ballot seems to have lodged upon ignorance of this Court's orders or a lack of understanding and notice, a detailed and factual as well as historical summary seems necessary.

**B. *The Factual Setting.***

**1. Greene County, Alabama.**

Eutaw, where defendant Herndon has his office is "a rural county seat town," the county's largest, with a population of approximately 2800, half of whom are Negroes (Herndon 13-14).

The courthouse is on a square which is "you could say, in the middle of the town." *Id.* The business district stretches ". . . in one direction, probably about three blocks, the other way about two blocks." *Id.* at 15.

The County's population of 13,600 in 1960 included 11,050 Negroes (81%). *Bureau of the Census (1960), Alabama* 2-63. Agriculture occupied 1697 of its 4033 employed persons. *Id.*, 2-204.

There are two employers larger than the county government: the Alabama Power Company Steam Plant and Bruce Products "when they are working" (Herndon 15-16).

The bulk of the county's population is poor and uneducated. Of 3120 employed males 932 earned less than $499 annually. *Bureau of the Census (1960), Alabama* 2-216. An income of less than $1000 was earned by 1148 of its 2807 families, the median income being $918 for males, $443 for females. *Id.*[45]

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[45] Alabama's Supreme Court judicially recognized the economic plight of the county, saying:

*(footnote continued on next page)*

The median education level of the county's Negro population is five years. *Id.* 2-222. The median number of school years completed is 5.8 years for men and boys and 7.2 for girls and women. *Id.* 2-198.

That the Voting Rights Act of 1965 might have been expected to have had an impact on Greene County, Alabama, is an understatement. This case results directly from its passage.

**2. The Voting Rights Act of 1965, Alabama, and Greene County.**

Eight Alabama counties, including Greene, were among the first designated for federal examiners listing eligible voters under Sections 7(a)-(d) of the Voting Rights Act of 1965. By 1968 four other Alabama counties had been added. Greene, Sumter and Marengo Counties, primary areas of NDPA success, have had Federal observers at every election since the May 3, 1966, Democratic Primary.[46]

The following chart illustrates the Act's effect on the registration of voters in Alabama, and in Greene County in particular.

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For example, it was shown that many of the Negroes who would otherwise be eligible [for jury service] are moving away from the county because of the lack of economic opportunity existing in Greene County for them and for other young people. The members of the white and Negro races who would be of benefit to the community and whose loss is felt in the county leave and hence leave the community poorer for their loss. Coleman v. Alabama, 195 So. 2d 800, 802 (1967), *rev'd per curiam*, 389 U. S. 22 (1967).

[46] POLITICAL PARTICIPATION 212 (1968).

*Registration and Percentage of Voting Age Population Registered*[47]

| | | |
|---|---|---|
| Pre-Act (May 3, 1964) | | |
| Nonwhite | 92,737 | (19.3%) |
| White | 935,695 | (69.2%) |
| Post-Act[48] | | |
| Nonwhite | 248,432 | (51.6%) |
| White | 1,212,317 | (89.6%) |
| Greene County, Pre-Act | | |
| Nonwhite | 275 | ( 5.5%) |
| White | 2,305 | (100+ %) |
| Greene County, Post-Act | | |
| Nonwhite | 3,953 | (79 %) |
| White | 2,057 | (124.7%) |

[47] *Id.*, 12-13, 222, 224-225. Figures compiled by the Voter Education Project of the Southern Regional Council, Inc. ("SRC") differ slightly. The SRC compilation as of August, 1968, is (from SRC files and published reports) as follows:

Registration and Percentage of Voting Age Population Registered.

| | | |
|---|---|---|
| Pre-Act | | |
| Nonwhite | 113,000 | (23.5%) |
| White | no figure available | |
| Post-Act | | |
| Nonwhite | 273,000 | (56.7%) |
| White | 1,117,000 | (82.5%) |
| Greene County, Pre-Act | | |
| Nonwhite | 542 | (10.8%) |
| White | no figure available | |
| Greene County, Post-Act | | |
| Nonwhite | 3,988 | (79.7%) |
| White | 2,102 | (127.4%) |

[48] As of October 31, 1967, the race of 14,279 registered voters was unknown.

According to the Voter Education Project of the Southern Regional Council, Inc., of Alabama's 67 counties, 41 have more than 100% of the 1960 age-eligible white population registered to vote. Additionally, three counties have above a 99% white registration. Only 13 Alabama counties have less than 90% of their 1960 age-eligible white population registered to vote.[48]

According to the United States Commission on Civil Rights, Alabama has adopted differing strategies to minimize the effect of the Voting Rights Act of 1965.[50] They include diluting the Negro vote by switching to at-large elections,[51] and enacting discriminatory reapportionment and redistricting plans.[52]

In order to prevent Negroes from becoming candidates or obtaining office Alabama has extended the term of the incumbent white officials,[53] increased primary filing fees[54] and withheld information from prospective Negro candidates.[55]

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[49] One of the ". . . factors which are important in determining whether there is a need for Federal observers in a particular county . . . [is] [h]ave the registration rolls been properly purged of persons who have died, moved away, or otherwise become disqualified?" POLITICAL PARTICIPATION, 158 n. 29.

[50] See, regarding the Voting Rights Act of 1965 generally the Findings, Conclusion and Recommendations of the United States Commission on Civil Rights, in POLITICAL PARTICIPATION 171-91.

[51] *Id.* at 23-24.

[52] *Id.* at 26-30; *Simms* v. *Baggett*, 247 F. Supp. 96, 109 (M. D. Ala. 1965).

[53] POLITICAL PARTICIPATION 41-42; *Sellers* v. *Trussell*, 253 F. Supp. 915 (M. D. Ala. 1966), *appeal dismissed*, 385 U.S. 19 (1966).

[54] POLITICAL PARTICIPATION 43-44.

[55] *Id.* at 48-49.

Negro registrants have allegedly had their names omitted from voter lists,[56] been harassed by election officials,[57] and, if illiterate, refused assistance in voting.[58] Their ballots have been disqualified on technical grounds,[59] and racially segregated voting facilities have been used.[60]

In primary elections Alabama officials have allegedly excluded or interfered with Negro poll watchers[61] and allegedly participated in vote frauds.[62]

Additionally Alabama has participated in the discriminatory selection of election officials,[63] and, of course, economic intimidation and pressure have been applied.[64]

Although, in the judgment of many, "[i]t is in the interest of national and local political party organizations to bring these new Negro voters—many of whom are forming independent political organizations—into their own folds"[65] in Alabama this interest has not been generally

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[56] *Id.* at 65.

[57] *Id.* at 67-69.

[58] *Id.* at 70-72, citing Gilmore v. Greene County Democratic Executive Comm., 368 F.2d 328 and 370 F.2d 919 (5th Cir. 1966).

[59] POLITICAL PARTICIPATION, 76-78.

[60] *Id.* at 83-84.

[61] *Id.* at 87-89.

[62] *Id.* at 96-98; see Gilmore v. Greene County Democratic Executive Comm., *supra*, n. 3.

[63] POLITICAL PARTICIPATION, 99-104. See also Gilmore v. Greene County Democratic Executive Comm., *supra*, n. 3. In the 1968 general election, but fourteen of 120 were Negroes (Herndon 56, 69).

[64] POLITICAL PARTICIPATION, 122-125.

[65] Statement of Vice-Chairman Eugene Patterson, *Id.* at 191.

recognized.[66] Indeed, prior to 1966 the Alabama Democratic Party emblem appearing on ballots had been a crowing rooster with a scroll above it containing the legend "White Supremacy" and a scroll below it inscribed "For the Right." In 1966 the party changed its rules to substitute the word "Democrats" for "White Supremacy."[67]

As in other Black Belt areas since 1960 Greene County has undergone a revolution of party voting patterns. In 1960 Democratic Presidential Elector nominees received 753 votes, those pledged to Mr. Nixon received 381. By 1964 the Democrats received 589 votes, those pledged to Mr. Goldwater received 1124. *The World Almanac* 215 (1968). In 1968, NDPA Presidential Elector nominees received 2118 votes, those of the AIDP 111, those pledged to Mr. Wallace 1551, Mr. Nixon receiving but 178. Official Election Returns, 1968.

It is in this county and state that the defendant Herndon professes a general lack of knowledge of this court's orders regarding a local election.

**3. The NDPA's Activity in the Black Belt.**

Although the NDPA's nominees for Presidential Elector received but 54,144 votes compared with 142,435 for the nominees of the AIDP, they carried two counties (Greene and Sumter) over those pledged to the candidacy of George

[66] See *Id.* at 133-152, and *passim.*

[67] *Id.* at 149. In 1962 this emblem was attacked as part of an action brought by Negroes who had been deprived of the right to run for positions on the Jefferson County Democratic Executive Committee. The District Court temporarily restrained the holding of the 1962 Democratic Primary election and, after negotiation, the case was settled, Negroes being allowed to become candidates but the emblem's message then remaining. Billingsley v. Bailes, CA No. 10119 (N. D. Ala. filed March 20, 1962).

C. Wallace. The AIDP Presidential Elector slate carried Macon County.

NDPA Presidential Elector nominees ran ahead of those of the AIDP in 16 counties. The bulk of its strength lay in the Black Belt counties of Autauga, Barbour, Bibb, Bullock, Greene, Hale, Lowndes, Marengo, Montgomery, Perry, Pickens, Sumter, and Tuscaloosa, and in the North Alabama counties of Blount, Colbert, and Madison. The AIDP statewide margin was augmented by a 59,124 vote lead over the NDPA in Jefferson and Mobile Counties.

That the NDPA was not a cause of concern in Greene County is incredible. In adjoining Marengo County they elected five justices of the peace. In adjoining Sumter County they elected four justices of the peace, three constables and the Chairman of the Board of Education. In Greene County their county chairman, Rev. Peter J. Kirksey, had already been elected to the school board. Had their two nominees for the school board been elected three of its five members would have been members of the Negro race.

And, most importantly, had the names of their four nominees been on the ballot they would have been elected to the Greene County Commission. The one remaining white member of the county's governing body would have been the defendant James Dennis Herndon.

That they would have been elected seems certain.[68]

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[68] The highest vote received by any white candidate for Greene County local office was 1709. The NDPA attracted 1938 straight ticket ballots (Report to the Court by defendant Herndon's counsel). And, although 2036 straight ticket NDPA votes had been counted this 1938 figure excludes all ballots on which there was any cross-over, the NDPA not fielding candidates for all statewide and local positions.

Indeed, the NDPA's Negro candidate for Congress received 2209 Greene County votes and its white candidate for the Senate received 2,133 votes.

**4. The Defendant Herndon and His Background.**

Defendant Herndon is a graduate of the University of Alabama School of Law, admitted to practice in Alabama (Herndon 5).

Although he has no opinion as to whether or not he ". . . is The [emphasis in text] political figure in that County . . ." (*Id.* at 7), he is Greene County's Juvenile Judge and is responsible for will and estate cases, the recording of land mortgages and deeds, and the filing of contracts and instruments. He also serves as Chairman of the Greene County Commissioner's Court (the county governing body). He is responsible for maintaining the voting rolls, the filings of candidates for county office, the certification of their names and ordering ballots[69] (*Id.* at 6-11).

He is also a farmer (*Id.* at 19).

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[69] Among other duties of probate judges they are charged by law to:

> Cause to be delivered to each polling place alphabetical lists of those who have paid their poll tax and those who are registered to vote thereat (Title 17, §138, Code of Alabama (Recomp. 1958)); receive and preserve for a time, one copy of the certificate of results of an election (*Id.* §139); receive certification of nominations by political parties for state legislative offices as well as certification of those independent candidates properly nominated therefor by petitions of electors and to cause the names of such nominees to be printed upon the ballots utilized in his county (*Id.* §145); receive from candidates not accepting their nominations notification to that effect (*Id.* §148); preserve all certificates and petitions for nomination for six months after the election (*Id.* §168); cause the printing of voter instruction cards (*Id.* §165); cause ballots, blank poll lists, certificates of results, oaths, and all other stationery and blank forms necessary to conduct the

### 5. The Defendant Herndon's Experience in This and Other Racial Voting Cases.

There are but three practicing attorneys in Greene County, Alabama,[70] each of whom is a member of the white race and one of whom, Ralph R. Banks, Jr., serves as

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election to be printed and cause the foregoing to be properly distributed (*Id.* §186); assemble, with others, and make a correct statement of election results (*Id.* §199); receive the original public declaration of the results of an election of members of the house of representatives and to record same and provide certified copies thereof and to allow a copy thereof to be posted on the courthouse door (*Id.* §200); receive and forward to the secretary of state certificates setting forth the returns of election for members of the legislature (*Id.* §209); perform duties required for general elections in special elections (*Id.* §221); receive the names of members of a committee to receive, expend, audit and disburse campaign contributions (*Id.* §274) and receive from it detailed, itemized statements of expenditures made (*Id.* §278) with an affidavit of the candidate attached thereto (*Id.* §280); prepare and distribute ballots for the primary elections (*Id.* §§344, 366); furnish to the officers of a primary election supplies as well as envelopes (*Id.* §354); supply voters whose votes are challenged with certificates to the effect that such voters' names are on official voters lists (*Id.* §355); allow his office to be utilized as the proper place for receipt of ballot boxes by the county chairman of a political party (*Id.* §363); receive from the secretary of state lists of the nominees of the political parties (*Id.* §369); furnish certified copies of the registration lists to the parties to an election contest (*Id.* §377); receive notification of the results of election contests before the state executive committee of a political party (*Id.* §387); accept expense accounts of candidates for the legislature (*Id.* §400).

[70] MARTINDALE-HUBBELL LAW DIRECTORY 26 (1968). The lack of legal advice available to Negro candidates and voters in the Deep South presents a problem in the "... dissemination of information concerning the right to vote and the requirement of registration ... qualifying for office, the rights of candidates and voters, and the duties of election officials ...." POLITICAL PARTICIPATION 185-86.

county solicitor,[71] attorney for the county governing body and as an attorney in condemnation cases (Herndon 12-13).

Although he represented the county Mr. Banks was "retained" by the white candidates "to take care of me, represent me. . . . Well, to help keep these names off the ballot" (Owens 16).

Mr. Owens, incumbent white candidate for the Board of Education, talked with Mr. Banks "[s]ometime in September." "He told me that we would not have any opposition in November" (*Id.* at 10, 17).

The other white incumbent member of the Board of Education during ". . . the first part of September . . . ", " . . . stopped by . . . " Mr. Banks' office and asked if he'd have any opposition. " . . . [H]e didn't think I had anything to worry about" (Gould 11). He was not concerned about defendant Herndon allowing an opposition name to be placed on the ballot " . . . because Mr. Banks told me he thought I need not be concerned" (*Id.* at 17).

A white member of the County Commission for twenty-four years was told by Mr. Banks that he had no opposition "[t]wo or three times, sometime in September or first of October" (Carpenter 14).

A white incumbent County Commissioner of sixteen years' service was told by Mr. Banks that he'd have no opposition. He was told this in September (Drummond 12).

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[71] It is the duty of the county solicitor "[t]o prosecute and defend any civil action in the circuit court in the prosecution or defense of which the state is interested." Additionally he is "[t]o give *every* county official an opinion in writing on all matters connected with their respective offices . . . ." Title 13 §229, Code of Ala. (Recomp. 1958) (emphasis added).

Another white incumbent County Commissioner of eight years' service was also so advised. He too " . . . asked Mr. Banks, not the Judge," (Seale 7), as did another white candidate who was told in September " . . . I didn't have anything to worry about that is all. I just took it at that" (Henderson 13-14).

The Clerk of Court received the same information from Mr. Banks (Yarbrough 13, 14, 18), but William Earl Lee, the sheriff, simply knew nothing about the NDPA (Lee *passim*). But see the affidavit of William McKinley Branch in the Appendix at 18a-23a.

Sheriff Lee is the Lee of *Herndon* v. *Lee,* 281 Ala. 61, 199 So. 2d 74 (1967) (Lee 21-22).

Defendant Herndon is the Herndon of *Herndon* v. *Lee, supra.*

In *Herndon* v. *Lee, supra,* Mr. Banks represented Sheriff Lee. He now represents the white candidates, Sheriff Lee and the Circuit Clerk. On October 14, 1968—the day on which defendant Herndon received a copy of the District Court order dissolving the Temporary Restraining Order and this Court entered its first order and defendant Herndon wrote the printer telling him to delete the names of NDPA candidates from the ballot—Mr. Banks wrote defendant Herndon threatening suit, citing *Herndon* v. *Lee, supra,* feeling certain " . . . that such action will be considered by you as [*sic*] was in the Herndon v. Lee case and have no effect on our friendship. Sincerely, Ralph." For full text of the letter see Appendix pp. 37a-39a. See also Herndon 49-53; Gould 16-17).

On that day Commissioner Drummond attended the County Commission meeting and was told by defendant Herndon " . . . we didn't have any opposition, and I am

having to order the ballots to be printed today" (Gould 12, 18-20).

Thus, the facts of this case unfold as a not improbable sequel to earlier litigation.

While *Herndon* v. *Lee, supra,* was pending in Alabama's courts simultaneous litigation arising from the 1966 Greene County election was pending in federal courts. See *Gilmore* v. *Greene County Democratic Party Exec. Comm.,* Civ. No. 66-341 (N. D. Ala., filed May 27, 1966), *on interlocutory appeals,* 370 F. 2d 919, 368 F. 2d 329 (5th Cir. 1966); and *United States* v. *Executive Comm. of the Democratic Party of Greene County,* 254 F. Supp. 543 (N. D. Ala. 1966).

And, in the federal proceedings Mr. Banks, at that time suing defendant Herndon in state court, assisted in his federal representation.

Mr. Banks' name does not appear in the report of the federal cases. But he did enter an appearance on behalf of defendant Herndon in the deposition proceedings. ("I believe in the deposition he represented some of us" (Herndon 78. See also *id.* at 51-52, 77-80).) Defendant Herndon had been testifying regarding the procedure employed in assisting illiterate voters. The following transpired:

> Q. Did any person from the Solicitor's office concur in your instructions, that is, concur in your instructions to the voting officials?
>
> Mr. Hubbard: I am going to object to confidential communications between attorney and client.
>
> Mr. Wallace: I understand the person from the County Attorney's Office is Attorney for all officials?
>
> Mr. Banks: Under the public law I am an officer, a public officer of this County and a legal adviser.

Mr. Hubbard: He does appear of record as County Attorney and County Solicitor.

Mr. Wallace: I would appreciate it if Mr. Hubbard would make all objections of that type, and not be made by you. [sic]

Mr. Banks: I object to that.

Mr. Hubbard: I made the objection. The record will show it.

Mr. Wallace: It is hard for the reporter to keep track of who is talking.

The Witness: I think the reporter can handle this.

Mr. Wallace: Mr. Herndon, you are not taking the deposition?

Mr. Hubbard: Let me say this: Under the Federal Rules the witness has a right to object. Even though Mr. Banks may not appear as counsel in this case, if necessary I will place his name on record as counsel. I request the reporter to add as one of counsel for all defendants in this case Mr. Ralph Banks, of Eutaw, and under the Federal Rules either or both counsel are authorized to and may make objections at any time during the taking of these depositions.

Mr. Banks: I am admitted to practice in the Northern District.

Mr. Wallace: That is acceptable. Deposition of J. Dennis Herndon at 9-11, *Gilmore* v. *Greene County Democratic Party Exec. Comm.*, Civ. No. 66-341 (N. D. Ala., filed May 27, 1966).

In 1966, among other things, Greene County officials had determined that " . . . federal observers would not be permitted to observe the election inspectors assisting those

who were unable to cast their votes without such assistance." *United States* v. *Executive Comm. of the Democratic Party of Greene County*, 254 F. Supp. 543, 544 (N. D. Ala. 1966). In *Herndon* v. *Lee*, 281 Ala. 61, 199 So. 2d 74 (1967), the Rev. Mr. James E. Gilmore, a Negro, was denied a place on the ballot because of various technicalities in his filing of the Corrupt Practices Act Statement. The Fifth Circuit, on an interlocutory appeal, concluded "that the trial court erred in its determination that the certificate of nomination filed by the Freedom Party as to these two candidates [one of whom was Mr. Gilmore] was invalid." *Gilmore* v. *Greene County Democratic Party Executive Comm.*, 368 F. 2d 329 (5th Cir. 1966). The court stayed the general election.

Then, in *Gilmore* v. *Greene County Democratic Party Executive Comm.*, 370 F. 2d 919 (5th Cir. 1966), the Fifth Circuit denied a motion to recall its mandate issued pursuant to the foregoing opinion. The court also denied Mr. Gilmore's request to enjoin prosecution of *Herndon* v. *Lee*, *supra*, which had been ". . . commenced after our decision . . ." *Id.* at 920. It was noted that the plaintiffs were ". . . apprehensive lest that state court judgment, even though now appealed . . . to the Alabama Supreme Court, will, either through lack of adequate representation of their point of view or otherwise, be decided without full consideration of the position taken by [them]" *Id.*[12]

[12] Their apprehension was well-founded:

> A petition, asking that the submission be set aside, that petitioner be permitted to assign errors and file briefs, and for other relief, purporting to be filed in Gilmore's behalf, was presented to this court. The petition is signed, "Fred Wallace, Attorney for Petitioner." . . . We do not find the name, "Fred Wallace," on the role of attorneys who have been permitted to practice before this court. . . . Because the petition was not presented by an attorney authorized to represent litigants

The case is still pending in the Northern District of Alabama as Civil No. 66-341 (N. D. Ala., filed May 27, 1966).[73]

And Greene County bore the expense of *Herndon* v. *Lee*, *supra* (Herndon 56).

**6. The Defendant Herndon Had Actual Knowledge of the Orders of This Court.**

Defendant Herndon reads the newspapers (Herndon 45-47, 60-65, 70-76).

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before this court, the petition is due to be and is stricken. Herndon v. Lee, *supra*, 281 Ala. at 66.

(Fred Wallace appears as Gilmore's counsel in the two reported Fifth Circuit decisions.)

Thus, although the Fifth Circuit had been "... advised that ... [the Negroes were] parties to that pending state court suit and ... [were] thus entitled to be heard in the Alabama Supreme Court," 370 F. 2d at 920, that was not the case. For further elucidation regarding these proceedings where the Rev. Gilmore was finally represented see Gilmore v. Lee, 210 So. 2d 415 (Ala. 1968) where the Alabama Supreme Court held that if it had been "... correct on first appeal, an affirmance is correct now." *Id.* at 418.

[73] The judicial history of racial discrimination by Greene County public officials has not been limited to the right to vote and run for public office; racially discriminatory jury selection also has been found there on more than one occasion. See Coleman v. Alabama, 389 U. S. 22 (1967); Bokulich v. Jury Commission of Greene County, Civ. No. 66-562 (N. D. Ala. Sept. 19, 1968); *cf.* Coleman v. Alabama, 377 U. S. 129 (1964); Coleman v. Barton, No. 63-64 (N. D. Ala., June 10, 1964).

And *cf.* Kirkland v. Wallace, 4 Cr. L. 2151 (5th Cir., Oct. 22, 1968):

> Appellants, a group of civil rights workers, were arrested in 1966 while distributing boycott leaflets upon a public sidewalk in Eutaw, Alabama.
>
> ....
>
> Shortly thereafter, the charges were dismissed, with assurances that the arrests had been a "slip-up" .... *Id.*

Despite contentions of mootness, the court of appeals held the ordinance unconstitutional.

In this case that was quite an admission for:

1. Commissioner Drummond heard nothing about this lawsuit (Drummond 7), even though he subscribes to the Birmingham Post-Herald, and the Tuscaloosa News and the Greene County Democrat (*Id.* at 11).

2. Commissioner Carpenter subscribes to the "Birmingham News, Tuscaloosa News and I get a bunch of them; I don't get to read them" (Carpenter 13). Indeed, when he received a copy of the sample ballot upon which his name and the name of his NDPA opposition appeared he ". . . just dropped it in the trash can and didn't look to see . . . I get so much of that mail, it would have to be marked personal for me to look at it. I just throw" (*Id.* at 17).

3. Commissioner Seale subscribes to the Greene County Democrat and the "Tuscaloosa News, Sunday paper, Birmingham News. . . ." but read nothing about this case (Seale 13).

4. Commissioner Henderson subscribes to the Greene County Democrat which he "very seldom" reads, and the Tuscaloosa News which he "never" reads. Nor did he learn about this case from television (Henderson 7-10).

5. Board of Education member Owens subscribes to the Tuscaloosa News and the Greene County Democrat, has a television set and "heard something about" this litigation in September (Owens 7-8).

6. Board of Education member Gould reads ". . . the funnies, the stock market and the headlines sometimes" (Gould 9).

But several of them had heard "rumors" about the NDPA and its candidates (Seale 7; Owens 16; Drummond 8-10; Yarbrough 12), and Commissioner Seale saw his opponent, "[o]n Saturday before Tuesday, he was in town passing cards out. But that is all, just then two days before Election Day" (Seale 14).

Even the editor and publisher of the Greene County Democrat knew nothing of this Court's order, even though his own October 31, 1968, newspaper published an article relating that the NDPA ". . . is the party ordered on the Alabama ballot by the United States Supreme Court Saturday . . ." concluding that it also had ". . . a host of candidates for local offices." He had only read the first part of the article—*an article which he admitted he had printed* (Martin 15-16). He ". . . voted for the entire slate of George Wallace. Took me one second to make the mark and that was it" (*Id.* at 13-14).

Mr. Banks brought out the fact that Mr. Martin had neither read the article ": . . nor set the type in its entirety" (*Id.* at 23).

The undisputed evidence is:

a. Defendant Herndon is the only Alabama Judge of Probate who failed or refused to abide by this Court's orders (Bookout 10).

b. He knew of this appeal and the issuance of orders by this Court (Herndon 42, 47).

c. He made no inquiries—as he put it, "I didn't make any effort" (*Id.* at 75)—about the case other than to discuss it with Mr. Banks (*Id.* at 26-27, 48, 55, 67, 74-75).

d. He had absentee ballots printed with the names of the NDPA nominees for local office on them (*Id.* at 38).

e. He never advised the NDPA's local nominees of their removal from the ballot (*Id.* at 30), " . . . because they never asked" (*Id.* at 66).

f. The white and Negro local candidates filed the same documents with him, each of them filing Garrett Law Declarations, Corrupt Practices Act designations post-primary and post-general election statements (*Id.* at 58, 60), the white candidates' statements showing that they made no campaign expenditures for the general election. Two additional documents were filed by the Negro candidates:

1. a certificate of mass meeting and, 2. an additional Corrupt Practices Act designation filed by counsel.

g. He removed their names from the ballot due to an alleged failure to file the Corrupt Practices designation[74] (*Id.* at 41-42).

The following joint response (signed by counsel for defendant Herndon and by Mr. Banks as attorney for the

[74] In its Answer to the Complaint below the state relied on three grounds:—the holding of no mass meeting and failure to file a Garrett Law declaration as well as the corrupt practices filing failure now relied upon (R. 278, 285). Although defendant Herndon originally contended that no mass meeting had been held and no Garrett Law declarations had been filed (R. 307-08) he does not now place reliance on this. Defendant Herndon's original affidavits were procured by Mr. Banks (Herndon, 28-30, 31, 35, 67-68). But, so far as the defendant Herndon now knows there could have been a mass meeting (*Id.* at 35).

Greene County white candidates) filed in the District Court and the defendant Herndon's Response filed here show:

a. The original defendants included ". . . the Probate Judge of Autauga County, Alabama, as representative of the Judges of Probate of the State of Alabama."[75]

b. That on September 18, 1968, ". . .. each Judge of Probate of the State of Alabama was ordered to prepare or print ballots which included the nominees of the NDPA, and the use, display, or circulation of official ballots not including the names of the nominees of the NDPA was barred."

c. That the identity of the NDPA nominees covered by the District Court's order was known and absentee ballots with their names thereon were received by defendant Herndon on or about September 24, 1968.

d. The existence and dates of entry of this Court's orders of October 14 and 19, 1968, but the defendant ". . . further aver[s] that they did not learn of said actions of . . . [this Court] until after the General Election. . . ."

e. That defendant Herndon ordered the NDPA local candidates' names taken off the ballot on October 14, 1968. On that day, October 14, 1968, ". . . Defendant Herndon . . . determined that . . . [the NDPA local candidates] failed to comply with the provisions of Title 17, Sections 274 and 275, Code of Alabama (1958) and that by reason of such noncompliance, the Defendant Herndon . . . was

[75] The District Court held that "the plaintiffs properly bring this suit as a class action, and that the defendant Edward A. Grouby properly represents a class of defendants composed of the Judges of Probate of all counties in Alabama" (R. 539-40). Defendants did not contest that finding in this court.

prohibited from placing the names of such candidates on the ballot. . . ."

f. On or about October 17, 1968, the new ballots were received.

g. That defendant Herndon learned by newspaper account of the appeal to this court on or about October 15, 1968. He then averred:

1. He understood and believed this Court's orders applied only to NDPA's state and national candidates and he placed their names on the ballot.

2. ". . . [a]ll orders entered by this Honorable Court which applied to the Defendant Herndon were served upon him. . . ."

3. ". . . [T]he failure of any person to serve copies of the orders of . . . [this Court] further strengthened his understanding and belief that said orders did not apply to or affect his determination . . ." regarding NDPA's local candidates.

4. ". . . [H]e sincerely understood and believed that the said orders . . . had no application to him . . . and he did not learn that said orders did so apply to him . . ." until after the election.

5. He says he told NDPA Congressional candidate Branch and County Chairman and school board member Kirksey between October 14 and November 5, 1968, that the NDPA candidates' names would not be on the ballot. But see the affidavit of William McKinley Branch, appendix pp. 18a-23a.

6. He admits he gave out absentee ballots as sample ballots and told "all persons who asked" that

NDPA candidates would not be on the ballot; that a candidate's sample ballot in the local newspaper omitted NDPA names; and that neither he nor the other defendants knew NDPA candidates were campaigning.

7. That NDPA candidates carried the county wherever their names appeared on the ballot and that the highest number of votes received by any white candidates for local office was 1709.

8. That although the results of the election had been certified the white candidates have taken no oath of office and have not assumed the duties of office and the ballots and all other records have been and will be preserved.

**C. *The Defendant Herndon, Himself a Lawyer, Was at All Times Represented by Counsel.***

In the District Court in response to the Government's allegations that "Herndon and/or attorneys representing him had knowledge of . . ." this Court's orders he denied that he had such knowledge or ". . . had any attorney representing them [him] or any of them in connection with . . . [these] proceeding[s] . . . and further den[ied] that any attorney representing them [him] or any of them had knowledge of said orders . . . ."

He also averred that the omission of NDPA candidates' names ". . . was the result of ignorance . . ." the white candidates then agreeing that an injunction issue against them in order to prevent their assumption of office.

It is undisputed that defendant Herndon was a member of the class of Judges of Probate represented by Judge

Grouby of Autauga County, named in the original complaint. *Cf. Reynolds* v. *Sims,* 377 U. S. 533 (1964) and *Lee* v. *Washington,* 390 U. S. 333 (1968), *aff'g* 263 F. Supp. 327 (M. D. Ala. 1966).

The Attorney General of Alabama is charged by law with representing the state's interest in "all litigation" concerning it "or any department thereof" ". . . and the employment of any attorneys for the purpose of representing the state or any department thereof shall be the attorney general . . . ." Title 55 § 244, Code of Alabama (Recomp. 1958). "The deputy attorney general shall have all the power and authority . . . conferred by law on the attorney general . . . ." *Id.,* § 231(1)(4).

"The attorney general shall give his opinion, or otherwise, as to any question of law connected with the duties of the . . . Probate Judge . . . ." *Id.,* § 240.

Matters referable to the Judges of Probate and ballot preparation arose in this court at oral argument. See, *e.g.,* the opinion of Mr. Justice Harlan, 89 S. Ct. at 229-30. In addition to the portions of the oral argument there quoted, counsel stated:

> I do make this observation to the Court. There were 67 other defendants in the case below. Every probate judge in the State of Alabama was made a defendant. The only people who were required to file with Mrs. Amos, the Secretary of State, at all were the candidates for state-wide office.

And, of course, compliance was not only not impossible in Greene County but, in fact, the county was in compliance

and the defendant Herndon on October 14, 1968, ordered the ballot changed.[76]

Not only was Judge Herndon represented before this court by counsel but Alabama's Deputy Attorney General John G. Bookout, a member of the Bar of this Court, represented all defendants otherwise unrepresented in the District Court (Bookout 3-4). When preparing their defense the state attorney general's office telephoned each of the involved judges of probate and procured from them all documents in their possession (*Id.* at 5).

Mr. Bookout was informed of the issuance of this Court's order by the Clerk " . . . on a Saturday during the Alabama-Tennessee football game which was on television" (*Id.* at 6) [October 19, 1968].

He " . . . didn't understand at that point what had been reinstated." He " . . . had to sit down later and think back in my mind about the sequence of events before . . . [I] understood what had happened" (*Id.* at 8).

Following that to the best of his knowledge the state attorney general's office [defendant Gallion's office] took no steps to inform any defendant of the action of this Court, and Mr. Bookout did not know whether or not any defendants inquired of their office (*Id.* at 9).

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[76] In Alabama

> . . . the name of no person shall be printed upon the ballots who may, not less than twenty days before the election, notify the Judge of Probate in writing . . . that he will not accept the nomination specified in the certificate of nomination or petition of electors. Title 17 § 148, Code of Ala. (Recomp. 1958).

Thus, Alabama ballots should not, in any event, have been printed prior to October 17, 1968, the date of their delivery back to defendant Herndon.

But notification from Mr. Bookout was not necessary for non-lawyer Mabel S. Amos, a defendant and Alabama's Secretary of State. She read of this Court's order in the newspaper and believes she received a call from the Attorney General's office about it. Following that she made no further certifications (Amos 6-7).

Mrs. Amos received a call when the District Court dissolved its Order (October 11, 1968). As she put it:

> And I was trying to reword something to rescind my order, and before I could ever get it reworded they reinstated it, so I didn't see any necessity of doing anything else. They were on there and they all appeared on the ballots. So there was not any reason to do anything further. *Id.* at 8.

But, "... The Probate Judges certifies [sic] the printers." *Id.* at 8.

Defendant Herndon had no such hesitancy.

He is an attorney and when he testified was advised of his rights. His deposition was taken in the presence of his present counsel with the understanding that it would be used in this Court (Herndon 4, 7-10).

Mr. Banks, the county solicitor and simultaneously the lawyer for the white candidates, ". . . was the one that called it [grounds for disqualification] to my attention that they had not met this requirement" (*Id.* at 28-30).

Defendant Herndon never communicated with the state's attorney general or requested an opinion from him (*Id.* at 44, 54-57). But he may have discussed these matters with Mr. Banks even though he insists he had no attorney (*Id.* at 48).

Lawyer and defendant Judge Herndon contends that he told Messrs. Branch and Kirksey that the NDPA candidates would not be on the ballot but never told the candidates themselves " . . . because they never asked" (*Id.* at 65). The Rev. Branch denies this in his affidavit, a copy of which is set forth in the Appendix at 18a. And defendant Herndon later stated that when the Rev. Kirksey " . . . asked me had I heard anything from the court" and he told him " . . . no," he " . . . was assuming he [Kirksey] had discussed the situation with Branch. I don't know that for a fact" (*Id.* at 66).

There were other reports immediately following the election. According to Dr. Cashin's affidavit, Exh. A to Plaintiffs' Motion to Show Cause, defendant Herndon stated:

> . . . in his opinion they did not qualify. I told him I had a copy of the Supreme Court order which required placing the candidates on the ballot. He again informed me that they did not legally qualify. I asked by whose authority this was done. He said "They are not on the ballot."

And, according to the Birmingham *News*, *Id.* Exhs. B and C he said:

> Don't ask me why this group didn't appeal. Maybe they didn't pay their lawyer; I don't know

and, none of them "said anything to me about running."

## CONCLUSION AND PROPOSED REMEDY

The NDPA is a threat to the local, state, and Congressional candidates of the Alabama Democratic Party. The scheme of a two-headed elector slate requiring split ticket voting was designed to protect that party's more than 2000 local, state and national office-holders. That there are lambs among the wolves is not questioned. But although their "voice is Jacob's voice . . . the hands are the hands of Esau." *Genesis* 27:22.

In the environment of devices invented to delay effective Negro participation in Alabama politics Negroes were locked out of the State Democratic Party. Now that they have the right to vote the defendants are attempting to protect State office-holders by limiting the choice of Alabama's voters in the general election; the November 5, 1968, general election ballot was devised to lock NDPA out of the voting booth and to lock Negro voters into a political party still clearly committed to the doctrine of White Supremacy. The defendant state officials, Wallace-pledged nominees for Presidential Elector, local counterparts such as defendant Herndon have elaborated this "test or device."

AIDP, the "party within a party" (Amos, 89) worked one side of the street. The ADP worked the other. But the object was at all times to direct Negro voter traffic to ADP local, state and national nominees—candidates running on the ticket of George C. Wallace.

And where the NDPA constituted the gravest of threats, in Greene County, they adopted the simplest and crudest, if most effective subterfuge—they simply left the winners off the ballot.

As to the case in chief, plaintiffs contend that this Court should (a) declare the following sections of Title 17, Code

of Alabama (Recomp. 1958) unconstitutional on their face and as applied to plaintiffs: § 125 (insofar as it favors the two major parties in selection of election officials), § 145(3) (the Garrett Law), § 148 (last sentence—relating to number of ballot appearances—only), and §§ 274-75 (insofar as they would disqualify plaintiffs from running in the November 1968 general election); and (b) make permanent the temporary relief heretofore granted by declaring that the effect of that relief, when properly complied with, upon the November 5, 1968 general election is the correct application of the law to this case. As to Greene County and James Dennis Herndon the suggested remedy is that this Court should:

(a) Issue an order setting aside the results of the November 5, 1968, general election for the offices of Greene County Commissioner, Places 1 through 4, and Greene County Board of Education, Places 1 and 2, and requiring that a new election to fill the vacancies to be caused to occur thereby be held on a day certain (at the earliest practicable date); to be accomplished by an order to defendant Albert Brewer, Governor of Alabama, requiring that he cause a special election to be held for the foregoing offices as authorized by Title 17, Code of Alabama (Recomp. 1958) §§ 215, 217, the order by said Governor to include, as required by *Id.* § 217, a writ of election directed to the sheriff of Greene County this Court setting and he specifying therein the day on which such election is to be held, the cause and object of the same, and the names of the foregoing offices;

(b) Issue an order requiring defendant James Dennis Herndon to pay personally[11] as part of the costs of

[11] *Cf.* the order of the Fourth Circuit in Griffin v. County School Board of Prince Edward County, 363 F. 2d 206, 212 (1966)

this action, all expenses incident to the November 5, 1968, general election in Greene County, Alabama, and, additionally, all expenses of the special election to be held under said order as well as plaintiff's campaign expenses and all cost and other expenses incurred by and incident to this proceeding;

(c) In the event that additional factual matters are placed at issue and a determination thereof becomes necessary, to appoint a special master to hear testimony, receive evidence, and make findings of fact regarding such matters, if any;

(d) And, in any event, appoint a special master to supervise or conduct the following:

1. the special election required by this Court's order;

2. prior thereto the purging of the voter rolls of Greene County so that the names of persons who are deceased or non-resident are removed therefrom;[78]

3. the printing of ballots with appropriate emblems thereon in a manner which will permit straight ticket voting;

4. the appointment of election officials from lists provided by the NDPA and ADP county chairmen so that each party is equally represented at each polling place;

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requiring the contemptuous public officials personally ". . . to restore to the County Treasurer . . . through recapture or otherwise, an amount equal to the disbursements authorized and made . . ." and ordering a report on compliance to the court.

[78] *Cf.* the stipulation and portion of the opinion in Gray v. Main, CA. No. 2430-N (M. D. Ala. March 28, 1968) (slip opinion 49-52 and appendix thereto A9-A13) a copy of which is contained in the Appendix hereto at 40a.

5. the placement and work of federal observers at each polling place.

(e) Adjudge the defendant Herndon in civil contempt of the orders of this Court with the possibility of purging himself of such contempt only after doing each and every act and thing required by this Court's order such compliance to be reported by the special master appointed and, in the event of noncompliance by said defendant Herndon, then order that there be exacted from him a fine of $100 per day for each day he remains in default under said order.

(f) Determine whether the defendant Herndon was in criminal contempt of this Court and upon making such determination take such steps, if any, as are appropriate and proper under the circumstances.

Respectfully submitted,

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*Of Counsel*

# APPENDIX

## Constitutional and Statutory Provisions

## CONSTITUTION OF THE UNITED STATES

### ARTICLE I.

*Sect. 2.* The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

APPENDIX

*Sect. 3.* The Senate of the United States shall be composed of two Senators from each state, chosen by the legislature thereof for six years; and each Senator shall have one vote.

### ARTICLE II.

*Sect. 1.* The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and together with the Vice President, chosen for the same term, be elected as follows:

Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the state may be entitled in the Congress: but no Senator or

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No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen. . . .

*Sect. 3.* The Senate of the United States shall be composed of two Senators from each state, chosen by the legislature thereof for six years; and each Senator shall have one vote. . . .

### Article II.

*Sect. 1.* The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and together with the Vice-President, chosen for the same term, be elected as follows:

Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the state may be entitled in the Congress: but no Senator or

Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector. . . .

### Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

### Amendment XII

The electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the Presi-

dent, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

## Amendment XIV

*Sect. 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Sect. 2.* Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

## Amendment XV

*Sect. 1.* The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude—

## Amendment XVII

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures. . . .

# UNITED STATES CODE

## TITLE 18

§ 401. Power of court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

. . . .

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701.

## TITLE 28

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

## TITLE 42

§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color. Pub. L. 89-110, § 2, Aug. 6, 1965, 79 Stat. 437.

§ 1973b. Suspension of the use of tests or devices in determining eligibility to vote—Action by state or political subdivision for declaratory judgment of no denial or abridgement; three-judge district court; appeal to Supreme Court; retention of jurisdiction by three-judge court

(a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: *Provided,* That no such declaratory judgment shall issue with respect to any plaintiff for a period of five years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this subchapter, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. The court shall retain juris-

diction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

DEFINITION OF TEST OR DEVICE

(c) The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

§ 1973c. Alteration of voting qualifications and procedures; action by state or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State

or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. Pub. L. 89–110, § 5, Aug. 6, 1965, 79 Stat. 439.

# CODE OF ALABAMA (RECOMP. 1958)

## TITLE 17

§ 125. Political parties furnish lists from which appointments are made.—Each political party or organization having made nominations may, by the chairman of its state or county executive committee or nominees for office, furnish the appointing board a list of not less than three names of qualified electors from each voting place, and from each of said lists an inspector and clerk shall be appointed for each voting place; provided, that where there are more than two lists filed, the appointments shall be made from the lists presented by the two political parties having received the highest number of votes in the state in the next preceding regular election, if each of said parties present a list.

§ 145(3). Name of candidate not to be certified or placed on ballot unless declaration of candidacy filed on or before March 1 of election year; exceptions.—(1) The secretary of state is hereby prohibited from certifying to the judges of probate of the several counties and such judges of probate are prohibited from causing to be printed on the ballots for a general election the name of any candidate for a state, district or federal office who does not file a declaration of intention to become a candidate for such office with the secretary of state on or before the first day of March of the year in which such general election is held. Such declaration shall include a statement designating the political party whose nomination for such office the person seeks; or if such person is not a candidate for nomination

by a political party, then such declaration shall state that such person will be an independent candidate for the office. Provided, however, this section shall not apply to the printing on the ballot of the names of persons nominated by political parties to fill vacancies in such parties' nominations for state, district or federal offices when the vacancy occurs after March first of the year in which a general election is held; and the name of every candidate nominated by a political party to fill any such vacancy shall be printed upon the ballot for the general election, if such name is duly certified by the party, within the time prescribed by law, as such party's nominee.

(2) The judges of probate of the several counties are hereby prohibited from causing to be printed on the ballots for any general election in their respective counties the names of any candidate in such election for a county office who does not file a declaration of intention to become a candidate for such office with him on or before the first day of March of the year in which such general election is held. Such declaration shall include a statement designating the political party whose nomination for such office the person seeks; or if such person is not a candidate for nomination by a political party, then such declaration shall state that such person will be an independent candidate for the office. Provided, however, this section shall not apply to the printing on the ballot of the names of persons nominated by political parties to fill vacancies in such parties' nominations for county offices when the vacancy occurs after March first of the year in which a general election is held; and the name of every candidate nominated by a political party to fill any such vacancy shall be printed upon the ballot for the general election, if such name is duly certified by the party, within the time prescribed by law, as such party's nominee.

(3) Qualification on or before the first day of March of an election year as a candidate for nomination in a primary election as a political party's candidate in the general election shall, for the purposes of enforcing this section be deemed a filing of a declaration of intention to be a candidate for such office in the general election within the meaning of such term as used in this section.

(4) The provisions of this section are supplemental. It shall be construed in pari materia with other laws regulating elections; however those laws or parts of laws which are in direct conflict or inconsistent herewith are hereby repealed. (1967, Ex. Sess., No. 243, appvd. May 11, 1967.) [Supp. 1967]

§ 148. Ballots; how printed.—The ballots printed in accordance with the provisions of this chapter shall contain the names of all candidates nominated by caucus, convention, mass meeting, primary election, or other assembly of any political party or faction, or by petition of electors and certified as provided in section 145 of this title, but the name of no person shall be printed upon the ballots who may, not less than twenty days before the election, notify the judge of probate in writing, acknowledged before an officer authorized by law to take acknowledgments, that he will not accept the nomination specified in the certificate of nomination or petition of electors. The name of each candidate shall appear but one time on said ballot, and under only one emblem. (1909, p. 277.)

§ 274. Committee to receive, expend, audit and disburse money or funds contributed.—Within five days after the announcement of his candidacy for any office, each candidate for a state office shall file with the secretary of

state, and each candidate for a county office or the state house of representatives shall file with the judge of probate of the county, and each candidate for a circuit or district office, including the state senate, shall file with the judge of probate of each county which is embodied in said circuit or district, a statement showing the name of not less than one nor more than five persons elected to receive, expend, audit, and disburse all moneys contributed, donated, subscribed, or in any way furnished or raised for the purpose of aiding or promoting the nomination or election of such candidate, together with a written acceptance or consent of such persons to act as such committee, but any candidate, if he sees fit to do so, may declare himself as the person chosen for such purpose. If the statement required herein shall have been postmarked at any United States post office not later than midnight of the fifth day after the announcement of his candidacy, the candidate shall be deemed to have complied with the requirements of this section as to filing such statement within five days after the announcement of his candidacy. Such committee shall appoint one of their number to act as treasurer, who shall receive and disburse all moneys received by said committee; he shall keep detailed account of receipts, payments and liabilities. The said committee or its treasurer shall have the exclusive custody of all moneys contributed, donated, subscribed, or in any wise furnished for or on behalf of the candidate represented by said committee, and shall disburse the same on proper vouchers. If any vacancies be created by death or resignation or any other cause on said committees, said candidate may fill such vacancies, or the remaining members shall discharge and complete the duties required of said committee as if such a vacancy had not been created. No candidate for nomination or election shall expend any

money directly or indirectly in aid of his nomination or election except by contributing to the committee designated by him as aforesaid. (1915, p. 250; 1959, p. 1036, appvd. Nov. 13, 1959.) [Supp. 1967]

§ 275. Candidate acting as own committee.—Any person who shall act as his own committee shall be governed by the provisions of this article relating to committees designated by candidates. Failure to make the declaration of appointment or selection by any candidate as herein required is declared to be a corrupt practice, and in addition the name of such candidate so failing shall not be allowed to go upon the ballot at such election. (1915, p. 250.)

## Affidavit of Reber F. Boult, Jr.

(Caption omitted)

State of Georgia
County of Fulton

Reber F. Boult, Jr., after first being duly sworn deposes and says:

I am one of the attorneys for the plaintiffs in this action.

On October 25, 1968 I prepared a letter to the Judges of Probate of each county in the State of Alabama placing them on notice that the United States Supreme Court had ordered that the temporary relief originally decreed by the United States District Court for the Middle District of Alabama and served on them had been reinstated and continued in effect. A copy of this letter is attached hereto as Exhibit 1.

I am a member of the bar of the Supreme Court of Tennessee which court, by rule 38 of its Revised Rules, has adopted the *ABA Canons of Professional Ethics* as governing the conduct of the members of its bar. In order to obviate any possible question of the application of canon 9 (attached as Exhibit 2), before mailing the letter I telephoned L. Drew Redden, Esquire, Special Assistant Attorney General and counsel of record for defendants. I described the foregoing letter and advised him that, subject to his permission, I would mail it to each of the Judges of Probate. He replied that he did not believe that this would be necessary because it was his understanding that the Attorney General's office had already so notified the Judges, and he did not feel that he had authority to give me permission to communicate with them. After some dis-

cussion the conversation concluded with his assuring me that he would confirm with John G. Bookout, Deputy Attorney General and another counsel for defendants, whether the Judges of Probate had in fact been notified, and call me back. I in turn assured him that I would not mail the letter until hearing from him. He has not called back.

Not having heard from Mr. Redden or any other attorney for defendants, I have not mailed the letter.

Further deponent sayeth not.

REBER F. BOULT, JR.

(Sworn to December 31, 1968.)

## EXHIBIT 1 TO AFFIDAVIT OF REBER F. BOULT, JR.

(Letterhead of The Roger Baldwin Foundation of ACLU, Inc., 5 Forsyth Street, NW, Atlanta, Georgia 30303)

CERTIFIED MAIL

October 25, 1968

To The Judges of Probate in the
State of Alabama

Gentlemen:

This is to confirm to you and place you upon notice that the temporary restraining order heretofore issued by the United States District Court of the Middle District of Alabama in the case of *Hadnott* v. *Amos* and mailed to you by certified mail by the clerk of that court on September 18, 1968, has been reinstated and continued in effect by the United States Supreme Court by its orders dated October 14 and October 19, 1968.

Accordingly, it is still required that the names of the nominees of The National Democratic Party of Alabama appear on the paper ballots and voting machines as required by that order and the schedules attached thereto.

Yours very truly,

/s/ R. F. BOULT, JR.
Reber F. Boult, Jr.

RFB:ng
cc: Clerk, United States Supreme Court
Clerk, United States District Court for the
Middle District of Alabama
Honorable MacDonald Gallion
Honorable L. Drew Redden

# EXHIBIT 2 TO AFFIDAVIT OF REBER F. BOULT, JR.

## ABA Canons of Professional Ethics

### Canon 9

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

## Affidavit of Rev. William McKinley Branch

(Caption omitted)

State of Georgia
County of Fulton

Rev. William McKinley Branch, after first being duly sworn deposes and says:

I am 47 years old, born, reared, and educated in Greene County; my address is Route 1, Box 130, Forkland, Alabama. I am married and have seven children, six of whom reside with me and my wife. My college education includes three years of liberal arts at Selma University, Selma, Alabama and four years leading to a degree of Bachelor of Science at Alabama State College, Montgomery, Alabama; I am presently taking a correspondence course which is designed to lead to an L.L.B. from LaSalle University, Chicago, Illinois.

I am pastor of the Ebenezer Baptist Church in Forkland and of the Christian Valley Baptist Church in Boligee, Alabama. I have been active in various civic and civil rights organizations in Greene County; I am now the president of the Greene County branch of the NAACP and of the Greene County Civic Organization (a political education group interested in economic development and upgrading the status of the underprivileged; I am sorry to say that this organization is all Negro), and president of the Alabama Economic Development Council (a state-wide organization devoted to raising the economic status of the underprivileged, Negro and white).

I taught junior high school in Greene County for about 15 years, leaving in about 1962, finding it necessary to resign because of my participation in civil rights activities.

My civil rights activities have involved me in litigation before. This includes having been made a defendant in the state courts in suits where an injunction was sought against me and others, it being alleged that we had kept children out of school for the purpose of being in peaceful civil rights demonstrations seeking the right to vote prior to adoption of the Voting Rights Act. Some of this litigation is still in progress. I have also been one of the plaintiffs in a case in the United States District Court for the Northern District of Alabama seeking to insure equal opportunities for jury service on the part of Negroes.

I was a candidate for Representative in Congress from the Fifth Congressional District of Alabama in the November 5, 1968 general election, placing second in a field of five. According to newspaper accounts I received between 28,000 and 30,000 votes. I carried Greene County. I campaigned actively throughout the district for the office, seeking votes from Negroes and white people. A copy of a leaflet used in my campaign is attached as an exhibit to this affidavit. I was also on the slate of presidential electors for The National Democratic Party of Alabama, pledged to the Humphrey-Muskie ticket, receiving 54,144 votes according to newspaper accounts.

This was the only time I have run for public office although I was active on behalf of various candidates in Greene County in the 1966 Democratic primary in which my wife was a candidate for tax collector. She made the run-off but was defeated. This was the first time I had been actively involved in politics although I have been a registered voter and voted for approximately the last fifteen years.

I am very familiar with the people and affairs of Greene County, having been very close to and worked with a great

number of the Negroes in the county and having gained considerable familiarity with the white elements of the county largely by observation and occasional contact. For example, I have since 1962 been actively seeking to have established a bi-racial committee to deal with problems in the county and have discussed the matter with the Sheriff, Judge of Probate, Circuit Judge, County Solicitor, and the Mayor of Eutaw. (All of the foregoing being persons who are now holding the offices.) Both alone and with committees chosen by the Greene County Civic Organization I have discussed this with them a number of times but have gotten only a negative response. In these discussions I have pointed out numerous examples of problems in the county which could have been avoided had there been such a committee.

Because of my thorough familiarity with the county I know the general attitudes and matters of community repute throughout Greene County, particularly on racial problems, the climate being generally hostile to the rights and economic development of Negroes. For example, the impression is widespread among Negroes in the county that if any Negro who is employed in the industries in the county goes to a political meeting he will lose his job.

It was, during the campaign for the November 5, 1968 general election, common knowledge throughout the county among both Negroes and white people that the six candidates of the National Democratic Party of Alabama were campaigning for election. It is my evaluation of the situation that the white people in Greene County were opposed to these candidacies, this being borne out by my analysis of the voting results in which neither I nor the NDPA slate of presidential elector nominees received any votes that were ascertainably white.

As it is actually exercised, the persons and organizations at the present time with power in public affairs in the county are the Board of County Commissioners, the Judge of Probate, the Sheriff, the Mayor of Eutaw, the County Solicitor, and Mr. McClean, Chairman of the County Board of Equalization, and to some extent the School Board.

Some of the difficulties that Negroes have experienced in the county are exemplified by the fact that various economic reprisals, particularly including eviction, have resulted from voter registration campaigns and Negro children attending previously all-white schools. Various organizations, including Negro churches, the Greene County Civic Organization, and the NAACP have taken various actions to assist those who have suffered these reprisals. These organizations have advised that redress should be sought through traditional channels, and in furtherance of this I have conferred several times with representatives of the United States Departments of Justice and Agriculture, which have had representatives investigating the problem; I am advised by these Departments that they are working on these matters at the present time although so far it has not produced tangible results.

The white candidates who ran for county office in the November 5, 1968 general election all campaigned extensively (as did the Negro candidates) in the May, 1966 [sic 1968] primary, handing and sending out letters and cards and going door to door. For the general election however so far as I personally know or know from reputation or from my knowledge of the community, they did not campaign at all in the general election although their opposition was the same. The candidates of the National Democratic Party of Alabama again campaigned extensively for the general election, handing out literature, making personal appear-

ances around the county, organizing and attending rallies, and appearing on radio.

Sometime during the week of September 23, I was in the office of Judge Herndon to secure a sample ballot and had a conversation in which I asked if he thought that the names of the NDPA local candidates would be on the ballot, to which he replied, in essence, "I don't think so." I was informed that no sample ballots were available at that time. I did at a later time, but not later than two weeks prior to the election, obtain a sample ballot from Judge Herndon in his office.

At no time prior to the November 5, 1968 general election was I informed either directly or indirectly that the local candidates of the NDPA would not appear on the ballot. My first knowledge of this was after I received my ballot to vote on election day, about 8:45 a.m.

A few days after the election I went to the Sheriff's office to ask him if he knew why the NDPA local candidates did not appear on the ballot. When I asked him this he replied that he did not know; Mr. Ralph Banks, county solicitor, was present at the time; he replied, in essence, "I wrote the judge [Herndon] a letter instructing him that if he did put the NDPA local candidates on the ballot he [Banks] would file suit against the judge for the state."

During this same conversation Sheriff Lee asked why we ran all black candidates, to which I replied that this would not be the case if we had the sort of bi-racial committee that was previously suggested. Sheriff Lee told me however that I was the one who had said that all of the Negro candidates should run; I observed that under the circumstances this was correct but I asked how he knew this, to which he replied that he had a man there with a tape recorder and that he could play it back any time he got ready. Mr. Banks said that they have somebody with a tape re-

corder at all of our meetings and that they know everything that we talk about. It was clearly understood that it was at least the Greene County Civic Organization that was being referred to.

The Greene County Civic Organization has a county-wide meeting every Monday night at the First Baptist Church in Eutaw, Alabama and committee meetings at least monthly at the Greene County Community Center House in Eutaw. These meetings are held regularly year round, including September, October, and November, 1968. The candidacies of the NDPA were extensively discussed at all of these meetings.

Further deponent sayeth not.

WILLIAM MCKINLEY BRANCH

(Sworn to December 24, 1968.)

(See opposite) ☞

## William Branch's Accomplishments and Qualifications

1. Past President of the Greene County Education Association.

2. President and organizer of the Greene County Civic Organization.

3. President and organizer of the Greene County Democratic Conference.

4. President of the Alabama Rural Development Council.

5. Member of the Board of Directors of the Southern Rural Project.

6. President of the Alabama Farmers and Rural Development Council, Inc.

The National Democratic Party Of Alabama

**VOTE FOR THE EAGLE AND SOCIAL AND ECONOMIC PROGRESS**

●

**Campaign Headquarters**

**2119 Broad Street**

**Tuscaloosa, Alabama 35401**

**Telephone 759-5459**

Pd. Pol. Adv. by Joe Mellichamp

# Wm McKinley Branch

## *for Congress*

☆ *It's Time* ☆

*to Change America*

William Branch welcomed Robert Kennedy to Tuscaloosa last March. Some of the ideals shared by Kennedy and Branch have been listed in the platform below.

# We Can Change America

WILLIAM BRANCH pledges to make democracy work for all Alabama's citizens. Specifically, William Branch believes...

1. THE PROGRAMS of the local, state and federal governments should be administered fairly, to all without regard to race, creed, color or national origin.

2. ALABAMA'S WATERWAYS and other natural resources should be developed fully in order to insure the greatest possible economic development for Alabama.

3. AN INCREASE in Unemployment and Workmen's Compensation is long overdue.

4. THE VOTING AGE should be lowered to 18 so our young people might renew their faith in the democratic process.

5. THE WAR in Viet Nam should be brought to a quick and lasting end.

6. WHITE AND BLACK people should begin to work together to solve their mutual problems, and should cast out the old prejudices which have divided our state and nation for so long.

7. WE SHOULD PROVIDE an increase in financial support for public schools and colleges in order to provide quality education for all children, regardless of race or economic condition.

8. LEGISLATION benefitting small farmers and farm cooperatives should be vigorously encouraged.

## Background of William Branch

William Branch has lived in Alabama all his life and was educated in Alabama's public school system. Reverand Branch studied Liberal Arts and Theology for three years at Selma University and in 1956 he received his B.S. degree from Alabama State Teacher's College in Montgomery.

Reverand Branch taught history and government in the public school system for fifteen years. Branch is married and is the father of seven children.

At present Reverand Branch is the pastor of the Ebenezer and the Christian Valley Baptist Churches.

## Affidavit of Frenchie Burton

(Caption omitted)

State of Georgia
County of Fulton

Frenchie Burton, after first being duly sworn deposes and says:

I live at Route 3, Box 70, Eutaw, Alabama; and I was a candidate for Board of County Commissioners, District 4 (in which district I live).

I am 64 years old, a semi-retired farmer (still farming some, raising cows, hogs, and corn). I am married and have two grown children, one of whom is living in Nebraska and the other in California. I was born and have always lived in Greene County. I am a member of the Greene County Civic Organization, church, and a masonic lodge.

My wife and I first registered to vote about 13 years ago, she being the first Negro woman to register to vote in Greene County. My campaign for the County Commission in the May 1968 primary was the first time I have been actively involved in politics.

I filed a declaration of my candidacy in February 1968 and, after the election (which I lost) during May I filed my statement of campaign contributions and expenses with the office of the Probate Judge.

I actively campaigned for this office prior to the November 1968 general election. I observed the white candidates for county office including my opponent, Herman Drummond, actively campaigning for the office for the May primary but I did not observe any campaigning by any of them for the November election.

Within thirty days after the general election I filed a statement of campaign income and expenses with the office of the Probate Judge.

I saw a sample ballot a day or two before the election which had my name on it. I was first informed that I was not on the ballot at the election about noon on election day.

I saw and conversed with my opponent several times during the campaign for the primary election but did not see him at all during the campaign for the general election. During these campaigns I handed out cards and attended rallies and meetings. The cards I handed out for my candidacy also had the names and the offices for which they were running of all of the other candidates of the National Democratic Party of Alabama who were running in Greene County. I would estimate that I handed out about 200 of these cards. The six Greene County candidates of the NDPA generally split the county up into areas and campaigned on each other's behalf in their respective areas.

Further the deponent sayeth not.

FRENCHIE BURTON

(Sworn to December 24, 1968.)

## Affidavit of Vassie Knott

(Caption omitted)

State of Georgia
County of Fulton

Vassie Knott, being duly sworn deposes and says:

I am a member of the National Democratic Party of Alabama (NDPA) and ran on the NDPA ticket in the November 5, 1968 general election for the office of County Commissioner, Place No. 1, Greene County, Alabama.

I am 68 years old, married and have three grown girls who are now married and have families of their own. I reside at Route 1, Box 106, Boligee, Alabama. My education consists of completing the sixth grade.

Although I had helped Rev. Thomas E. Gilmore in his campaign for sheriff in 1966, running for County Commissioner was my first involvement in campaigning for political office. I filed the Declaration of Intention for this office in February 1968, and in May, after the primary, and again within 30 days after the general election, a statement of campaign contributions and expenses under the Corrupt Practices Act.

I campaigned for County Commissioner in the general election for approximately five weeks. I visited people, handed out cards, spoke at church meetings and asked people to vote for me. My opponent Mr. G. D. Seale campaigned during the primary but not in the general election.

During my campaign Mr. Peter Kirksey and Rev. William McKinley Branch told me that everything was all right and that the NDPA candidates were going to be on

the ballot. I campaigned thinking that I was going to be on the ballot. No one told me otherwise.

I was informed that I was not on the ballot on November 5th when neighbors told me that they had just gone to vote and that I was not on the ballot. I was altogether surprised as I was expecting to be on the ballot.

Further the deponent sayeth not.

VASSIE KNOTT

(Sworn to December 24, 1968.)

## Affidavit of Harry C. Means

(Caption omitted)

State of Georgia
County of Fulton

Harry C. Means, being duly sworn, deposes and says:

I am a citizen of the State of Alabama and reside at Route 1, Box 21B, Boligee, Alabama. I was born May 17, 1924, am 44 years old, married and have four children, 1 boy and 3 girls, ages 16, 13, 12 and 2, all living with me and my wife. I attended Tuskegee Institute, Tuskegee, Alabama, for three years from 1946 to 1949.

I am a member of the National Democratic Party of Alabama (NDPA) and ran for the office of County Commissioner, Place No. 2, Greene County, Alabama on the NDPA ticket in the November 5, 1968 general election. I have filed the Declaration of Intention for this office in February 1968, and, in May after the primary, and again within 30 days after the general election, a statement of campaign contributions and expenses.

This was my first time running for political office. I had been previously appointed to the Loaning Committee of the Farmers Home Administration from 1963 until June 1968. In June 1968 I was appointed to the Wheat, Grain and Soybean Advisory Committee to the Secretary of Agriculture.

I campaigned for County Commissioner in the general election for approximately two months. During this period I went around throughout the county giving out cards and asking people to vote for me. I also attended church meetings, was introduced as running for County Commissioner

and was given an opportunity to explain why I thought I could do the job. My opponent Mr. J. E. Henderson was campaigning and handing out cards during the primary but did not do much campaigning during the general election. At times I wondered why he wasn't campaigning.

During my campaign I had been informed by Mr. Peter Kirksey and Rev. William McKinley Branch that the NDPA candidates were going to be on the ballot. I campaigned with the idea that I was going to be on the ballot. During my campaign no one informed me that either myself or any of the NDPA candidates would not be on the ballot. It was not until November 5, election day, that I found out from neighbors that I was not on the ballot. Not being on the ballot was a surprise and a great letdown to me. I was so sure we were going to be on the ballot. So many people promised they'd vote for me—I thought I was going to win.

Further the deponent sayeth not.

HARRY C. MEANS

(Sworn to December 24, 1968.)

## Affidavit of Levi Morrow, Sr.

(Caption omitted)

State of Georgia
County of Fulton

Levi Morrow, Sr., after first being duly sworn, deposes and says:

I live at Route 3, Box 117, Eutaw, Alabama. I was a candidate of the National Democratic Party of Alabama for County Commissioner, District 3 (in which I live), Greene County, Alabama in the November 5, 1968 general election.

I am 65 years old, have lived in Greene County all of my life, am a farmer raising cattle and hogs, and am married with 12 children ranging in age from 21 to 41, all educated.

I have a sixth grade education from the schools of Greene County, Alabama.

I was first registered to vote 12 years ago but was not actively involved in a political campaign until my own campaign for this office in the May, 1968 Democratic primary.

I am a member of the Greene County Civic Organization, a church, a Masonic lodge, and a trustee of Carver High School.

In February, 1968 I filed a declaration of my intention to be a candidate for this position for the May Democratic primary. I filed this in February 1968 on a printed form provided me by the Probate Judge's office. I actively campaigned for this office in the primary but was defeated.

During May after the election I filed my statement of campaign contributions and expenses.

I attended the National Democratic Party of Alabama state convention in Birmingham in July 1968.

I again campaigned actively for the November 5, 1968 general election, handing out about 1,000 cards (a sample of the card handed out by me and the other NDPA Greene County candidates is attached as an exhibit), making appearances, and attending political rallies, the only substantial difference between this and my primary campaign being that this time I saw no point in asking white people for votes.

It was not until I went to vote on election day about 1 pm that I first heard that I and the other county candidates of the NDPA were not on the ballot. Nevertheless on December 2, 1968, I personally filed in the Probate Judge's office a statement of my campaign contributions and expenditures.

I am generally familiar with activities in Greene County and particularly Eutaw, which I go into once or twice a week. I have observed almost every time I have been in town that two or more of the following are in or about the Sheriff's Office often playing dominoes together: Mr. Homer Carpenter, a member of the Board of County Commissioners, my opponent in the elections, Sheriff William Lee, Mayor William Tuck, W. P. McClean of the Board of Equalization, and County Solicitor Ralph Banks. This observation includes September, October, and November, 1968. It therefore appears to me that these people play dominoes in the Sheriff's office every day.

I was furnished a sample election ballot (which included the Greene County NDPA candidates) which I was in-

formed was obtained from the Probate Judge's office about two weeks prior to the election.

I observed the white local candidates, including my opponent, campaigning extensively prior to the May primary but did not observe any campaigning on their part for the general election.

Further deponent sayeth not.

LEVI MORROW

(Sworn to December 24, 1968.)

EXHIBIT TO AFFIDAVIT OF LEVI MORROW, SR.

**VOTE FOR THE FOLLOWING PERSONS**

**NOVEMBER 5, 1968**

For U.S. Congress

**REV. WILLIAM McKINLEY BRANCH**

For Greene County Commissioners

**HARRY MEANS** **FRENCHIE BURTON**

**LEVI MORROW** **VASSIE KNOTT**

For Greene County School Board

**ROBERT HINES** **JAMES A. POSEY**

Paid Political Advertisement by the Greene County Civic Organization, Rev. P. J. Kirksey, Chairman

**Letter Re Names on Ballots**

RALPH R. BANKS, JR.
ATTORNEY AT LAW
EUTAW, ALABAMA

October 14, 1968

Honorable J. Dennis Herndon
Judge of the Probate Court of Greene County
Eutaw, Alabama

Dear Sir,

The following candidates:

G. D. Seale, J. E. Henderson, Herman Drummond, and Homer Carpenter, nominees of the Democratic Party for the four places on the Court of County Commissioners of Greene County, and

Hugh Q. Gould and Richard E. Owen, nominees of the Democratic Party for the two impending vacancies on the Greene County Board of Education,

in the General Election to be held November 5th, 1968, have retained me to represent and protect their interests as such nominees, and have authorized me to institute any legal proceedings I consider necessary in the premises.

A certificate was filed in your office on the 4th day of September, 1968, purporting to nominate Vassie Knolt [sic] to oppose Mr. Seale, Harry C. Means to oppose Mr. Henderson, Levi Morrow, Sr. to oppose Mr. Carpenter, Frenchie Burton to oppose Mr. Drummond, Robert Hines to oppose Mr. Gould, and James Posey to oppose Mr. Owens, as candidates of the National Democratic Party of Alabama, fol-

lowing a mass meeting allegedly held in Eutaw on the 7th day of May, 1968.

I wish to call to your attention that none of the persons nominated to oppose my clients filed a statement of intent with you to the effect that they intended to be candidates of the National Democratic Party of Alabama on or before the first day of March, 1968, as is required by Section 145(3) of Title 17, Code of Alabama, 1940, Recompiled 1958, 1967 Pocket Parts (Act 243 of the 1967 Extraordinary Session of the Alabama Legislature).

Nor did any of the opponents of my clients file in your office the name(s) of the person(s) designated by them to receive, disburse, and account for campaign funds required by Sections 274 and 275 of the Code of Alabama, 1940, Recompiled 1958, portions of what is commonly known as the Corrupt Practices Act.

Either of the above omissions disqualifies the National Democratic Party candidates from being placed on the ballot according to the decision of the three judge panel of the U. S. Court for the Middle District of Alabama rendered 11 October, 1968. Also the Corrupt Practices Act omission disqualifies them from being placed on the ballot under the Alabama Supreme Court decision of Herndon v. Lee (281 Ala. 61, 199 So. 2d 74) and Gilmore v. Lee (—— Ala. ——, 210 So. 2d 415), with which cases you and I are thoroughly familiar.

Please advise me as to your intentions concerning placing the National Democratic Party of Alabama candidates on the ballot for the November 5th General Election. In event you intend to place them on the ballot, it will be my duty to my clients to have the Circuit Court of Greene County, Alabama, in Equity, to enjoin you from doing so.

I feel certain that such action will be considered by you as was in the Herndon v. Lee case and have no effect on our friendship.

Sincerely,

/s/ Ralph Banks, Jr.
Ralph Banks, Jr.

## Stipulation Acknowledged by Plaintiffs and Macon County Board of Registrars in Open Court

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 2430-N

FRED D. GRAY, *et al.*,
*Plaintiffs,*

—v.—

FRED D. MAIN, *et al.*,
*Defendants,*

UNITED STATES OF AMERICA,
*Amicus Curiae.*

It is agreed and stipulated by and between the plaintiffs and the defendant Board of Registrars of Macon County, Alabama, hereinafter sometimes called the Registrars, by and through their respective attorneys of record, as follows:

1. That the official voting list of qualified voters of Macon County as prepared and published by the Judge of Probate of Macon County, Alabama, for the primary elections of 1966 contained a number of names of persons thereon who are in law and fact not legally qualified voters of Macon County, Alabama, and should be removed from any voting lists containing their names.

2. That the Board of Registrars submitted a list of purgees to the Judge of Probate of Macon County, Alabama, in January of 1966, and that the names thereon, as well as other persons purged prior thereto by the Registrars, were not removed from the aforesaid official voting list through no fault, act or omission of the Registrars.

3. That in order to correct the list of qualified voters in Macon County and create a current valid list of such voters, it is agreed that the Court may enter substantially the following order or decree, to wit:

"DECREE"

"Under the evidence heard by the Court and the stipulation of the plaintiffs and the defendant, Macon County Board of Registrars, the Court is of the opinion and finds that the official list of qualified voters of Macon County, Alabama, as prepared and published by the Judge of Probate of Macon County for use in the 1966 primary elections contained numerous names of persons who are not legally qualified voters, and that a current valid list of voters should be prepared by the Registrars for official use by said Judge of Probate. Therefore, to accomplish such, it is hereby

"ORDERED, ADJUDGED AND DECREED as follows:

"1. That the Registrars shall forthwith begin a review of the latest 1966 list of qualified voters of Macon County (hereinafter called "the Voting List") by seeking to obtain current information from each person on said list and through the use of a "Voter Address Report" in the form set forth and attached as Exhibit "A" to this decree.

"2. That such Voter Address Report form, hereinafter called "the Form," be distributed to the persons named on said voting list by such methods as they deem appropriate and expeditious, including the aid of any responsible civic group or organization, or any responsible persons suggested by the plaintiffs and who will volunteer their services for such distribution; and that the Registrars give publicity, as a public service, by articles and announcements in the newspapers and over the radio stations in Macon County, Alabama, as to such voting list correction; and that with approval of the Macon County Board of Revenue the Registrars advertise its purpose to prepare a valid current list of qualified voters, showing in such advertisement the Voter Address Report form, Exhibit "A" hereto; that notices of the need for filing such form with the Registrars be posted on the County Courthouse Bulletin Board, in the office of the Board of Registrars and at each voting place in the County.

"3. That the following procedure shall be followed by the Registrars in compiling a valid current list of qualified voters as hereinafter ordered, to-wit:

a. A file will be set up showing, insofar as possible, all persons registered from 1902 to date.

b. A file will be set up showing, insofar as possible, all persons stricken from 1904 to date.

c. These files will be compared to determine names of all persons of whom there is a record of registration in the County and who have not been stricken.

d. All persons who turn in voter Address Report forms but of whom there is no record of registration will be noti-

fied and given an opportunity to produce proof of registration.

e. All persons who file such forms but fail to give complete information will be mailed a notice as to the information which they need to supply, and, if they still fail to respond, will then be mailed a request to appear before the Registrars so that they may be assisted in giving or obtaining complete information required by the forms.

f. After November 1, 1967, a notice shall be published in the Tuskegee News containing the names of all persons appearing on the 1966 list of qualified voters, who have failed to file such forms, or for whom there is no record of registration in the County; such notice to be a legal notice of intent to show cause why their names should not be stricken from the list of registered voters. A date for hearing, to be held not less than 30 nor more than 35 days after such notice, shall be set. Copies of such notice shall be posted at each polling place in the County, at one other location in each precinct or voting district, as the Registrar's office, and on the Courthouse Bulletin Board.

g. That in all respects the consideration of the legal right of persons to vote in Macon County shall be handled according to the laws of Alabama and that any person removed from the list of registered voters, if his whereabouts is known, shall be informed of this right to appeal any decision of the Registrars to the Circuit Court of Macon County.

h. That, following the completion of the work herein set out, and the determination of a valid list of the registered voters of Macon County, the Registrars shall pre-

pare in triplicate a copy showing the names of all registered voters as of the date of preparation, showing the full name, date of birth, race, sex, and precinct placement for voting, and it shall contain a signed statement to the effect that such list does contain the names of all persons on the registration list of the County, all other names having been duly and properly purged. One copy thereof to be filed with the Judge of Probate, one copy to be filed with this Court, and one copy to be retained in the office of the Registrars.

i. Such list shall henceforth be the list of registered voters of the County and no names shall henceforth be added to the list of registered voters except by registration.

j. All Voters Address Forms shall be retained for a period of one year after the completed valid list is filed as herein set out, and the list filed shall be retained as a public record by the Judge of Probate and the Registrars.

k. The plaintiffs shall have the right to inspect the records of the Registrars under the same conditions as public records are open to inspection, except that this shall not include inspection of registration applications for a period of one year from date.

l. That a list of all persons who are deleted or purged in accordance with this decree shall be prepared and furnished to this Court and another copy to the plaintiffs, showing the names, race, date of birth, sex and precinct.

## Decree

This court concludes that in order to minimize friction and misunderstanding between the races, and to attempt to reduce suspicions of discriminatory practices by the defendants, it is necessary to enter the following order. It is therefore the ORDER, JUDGMENT, and DECREE of this court that the Board of Registrars of Macon County, Alabama, together with their agents, officers, successors, and all of those acting in concert or participation with them be, and the same are hereby ENJOINED from failing to act as herein set out which is in accordance with an agreement between the plaintiffs and said defendants as set out in the Appendix and it is incorporated herein as if set out *in haec verba*.

It is the further ORDER, JUDGMENT, and DECREE of the court that the defendants, Fred D. Main, etc., the Board of Registrars for Bullock County, Alabama, together with their agents, officers, successors, and all those acting in concert or participation with them, be and the same are hereby ENJOINED from failing to follow the procedures hereinafter set out with reference to the purging of voters and the changing of beat assignments of voters:

(1) The Board of Registrars is to maintain

(a) A book styled NOTICE TO PURGE, and the names of all persons proposed to be purged are to be entered in this book whether they are purged or not, and the notice to purge is to be published in the newspaper as required by Alabama law;

(b) A book entitled PURGE BOOK, and in this book is to be entered the names of those who are purged after the completion of the process as required by Alabama law; and

(c) A PRECINCT BOOK which includes the names of all registered voters, and whenever a name is entered in the book hereinabove styled "Purge Book" as referred to above (b), that name is to be struck through in the "Precinct Book" herein styled in (c). The names entered in the "Purge Book" herein set out in (b), are to tally with the names struck through in the "Precinct Book" herein set out in (c).

(2) The Board of Registrars is to immediately complete the initiation of the above procedure, and at the earliest time thereafter, as provided by Alabama law, is to furnish in writing a Voter Registration List to the Probate Judge, and thereafter all newly registered voters are to be furnished the Probate Judge in writing. The Board of Registrars is to retain written copies of each list furnished to the Probate Judge together with the date of delivery to said judge. The Probate Judge is *NOT* to add any name to the Voter Registration List in his care and custody except it be submitted as herein described.

(3) (a) The Probate Judge is not to change the beat assignment of any registered voter except upon a written direction in accordance with the name and change as provided in writing by the Board of Registrars.

(b) The Board of Registrars is to retain a copy of the written change with the date of the delivery of said change to the Probate Judge.

It is further the ORDER, JUDGMENT, and DECREE of the court that the defendants, Fred D. Main, Probate Judge, together with his agents, officers, successors, and all those acting in concert or participation with him, be and they are ENJOINED from failing to do the following:

In all elections hereafter the election officials are to be instructed:

(1) That the rest room facilities at Beat 3 are NOT to be closed completely, and that whatever use is permitted, is to be available to all persons without regard to race or color; and

(2) Poll watchers are to be permitted the use of writing materials, i.e., pen, pencil, paper, etc., without restraint; and

(3) (a) The election officials at voting machines are to follow Title 17, Section 107, Code of Alabama 1940, without discrimination as to race which states that an illiterate voter ". . . may request assistance of two inspectors of his choice or some other person of his choice who has not previously so acted for any other person during the election. . . ."

(b) Where paper ballots are used the election officials are to follow Title 17, Section 176, Code of Alabama 1940, without discrimination as to race which provides that a person unable to prepare his ballot because of inability to write the English language "may have the assistance of any person he may select."

It is the further ORDER, JUDGMENT, and DECREE of this court that all other relief requested by the plaintiffs be and the same is hereby DENIED. Costs in this matter are to be taxed equally, one half against the plaintiffs and one half against the defendants for which execution may issue.

DONE, this the 28 day of March, 1968.

VIRGIL PETERSON
*United States District Judge*